TRANSCRIPT OF RECORD

upreme Court of the United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, PETITIONER,

vs.

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC.

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 19, 1956
CERTIORARI GRANTED FEBRUARY 25, 1957

SUPREME COURT OF THE UNITED STATES

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[fol. A]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

JAMES EARL BYRD, Plaintiff,

v.

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., Defendant.

AMENDED ANSWER—Filed November 15, 1955

The defendant, answering the Complaint of the plaintiff, respectfully shows to the Court:

I

That defendant denies each and every allegation of the Complaint not hereinafter expressly admitted.

II

The defendant alleges that it does not have sufficient information to form a belief as to the place of residence of the plaintiff and, therefore, denies the allegations of the Complaint in this regard.

III

The defendant admits that portion of Paragraph I and III of the Complaint that alleges the defendant to be a Corporation organized and existing under the laws of the State of South Carolina and engaged in the business of supplying, transmitting and distributing electric power in Anderson, Oconee, Pickens and Greenville Counties in the State of South Carolina; and in this connection the defendant alleges that it is a Cooperative, chartered under the laws of the State of South Carolina, to provide electrical service to rural residents in the counties aforesaid.

b

IV

The defendant admits upon information and belief that on or about February 17, 1953, and for a time prior thereto, [fol. B] the plaintiff was engaged in construction work at or near a sub-station being constructed in the County of Oconee, South Carolina, but this defendant alleges that it had neither possession nor control of said sub-station on the date aforesaid.

V

The defendant admits upon information and belief that on or about February 17, 1953, the plaintiff received certain injuries as a result of being shocked and burned, but the defendant expressly denies the allegations of Paragraph V, VI, VII and VIII of the Complaint.

VI

The defendant alleges that on the date of February 17, 1953, and prior thereto, the plaintiff was an employee of the construction firm of R. H. Bouligny, Inc.; that at the time the injuries of the plaintiff were sustained, the said R. H. Bouligny, Inc. had entered into a contract with this defendant whereby R. H. Bouligny; Inc. agreed to construct certain transmission lines and sub-stations for this defendant including the sub-station mentioned in the Complaint near Walhalla, South Carolina; that at the time of the accident alleged in the Complaint, the plaintiff was engaged in the course of his work for his said employer. *THE DEFENDANT ALLEGES THAT THE SAID R. H. BOULIGNY, INC. WAS OPERATING UNDER THE REQUIREMENTS AND IN ACCORDANCE WITH THE TERMS AND PROVISIONS OF THE SOUTH CAROLINA WORKMEN'S COMPENSATION LAW. THE DEFENDANT IS IN-

* The portions of Paragraphs VI and VII of the Answer set in capital letters were excluded from the Answer by the District Judge at the conference immediately preceding the beginning of the trial. These portions of the Answer were excluded from the jury on the basis that issues presented by such allegations were admitted by the Plaintiff. (Tr. 2-34.) The portion of Paragraph VII of the Answer in italics was read to the jury and testimony offered on this allegation but was stricken by the Trial Judge upon motion of Plaintiff's attorney at the close of the testimony. (Tr. 353-359.)

FORMED AND BELIEVES THAT SUBSEQUENT TO SUSTAINING HIS [fol. C] INJURIES, THE PLAINTIFF FILED CLAIM IN THE MANNER PROVIDED BY LAW AND COLLECTED FULL BENEFITS FROM HIS EMPLOYER FOR ALL SUCH INJURIES AND MEDICAL EXPENSES INCURRED AS PROVIDED UNDER THE WORKMEN'S COMPENSATION ACT OF SOUTH CAROLINA. The defendant alleges that any negligence and carelessness that may have occurred as the direct and proximate cause of plaintiff's injuries was solely and entirely that of the said R. H. Bouligny, Inc., the employer of the plaintiff, through its agents, servants and employees.

VII

THAT AT THE TIME THE PLAINTIFF SUFFERED HIS ALLEGED INJURIES, THE DEFENDANT, BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., HAD ELECTED TO COME UNDER THE WORKMEN'S COMPENSATION LAW OF SOUTH CAROLINA AND IT WAS PROPERLY QUALIFIED TO DO SO; THAT THE DEFENDANT HAD BEEN OPERATING UNDER THE WORKMEN'S COMPENSATION LAW OF THE STATE OF SOUTH CAROLINA FOR SOME YEARS PRIOR TO THE TIME OF THE ACCIDENT AND IS STILL OPERATING THEREUNDER. *That R. H. Bouligny, Inc., the employer of the plaintiff, was engaged in the performance of a contract with this defendant that included the construction of a sub-station and the plaintiff was working on this sub-station when his injuries were sustained; that the construction of the sub-station by the said R. H. Bouligny, Inc. pursuant to the terms of said contract was a part of the trade and business of this defendant* AND THE PLAINTIFF, BEING AN EMPLOYEE OF THE SAID R. H. BOULIGNY, INC., HAS NO RIGHT TO RECOVER AGAINST THIS DEFENDANT IN A COMMON LAW ACTION FOR TORT, BUT THAT THE RIGHTS OF PLAINTIFF TO COMPENSATION BY THIS DEFENDANT FOR ANY INJURIES WHICH HE SUSTAINED ARE LIMITED TO AND DETERMINED BY THE WORKMEN'S COMPENSATION LAW OF THE STATE OF SOUTH CAROLINA. THAT THE PLAINTIFF, HAVING ELECTED TO RECOVER COMPENSATION AGAINST HIS EMPLOYER, R. H. BOULIGNY, INC., AND ITS COMPENSATION CARRIER, [fol. D] ALL OF WHICH WILL MORE FULLY APPEAR BY REFERENCE TO RECORDS IN THE OFFICE OF THE SOUTH CAROLINA INDUSTRIAL COMMISSION, I. C. FILE NO. 5303088, THE SAID PLAINTIFF IS BARRED TO RECOVER FROM THIS DEFENDANT EITHER AT COMMON LAW OR UNDER THE WORKMEN'S COMPENSATION LAW.

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

(Anderson Division)

JAMES EARL BYRD, Plaintiff,

v.

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., Defendant.

Greenville, S. C.
November 28, 1955

Before: Hon. C. C. Wyche, U. S. District Judge.

APPEARANCES:

Henry H. Edens, Esq., Henry Hammer, Esq., and William E. Chandler, Jr., Esq. (Columbia, S. C.), for the plaintiff.

Ray R. Williams, Esq., and Wesley M. Walker, Esq. (Greenville, S. C.), for the defendant.

[fol. 2] (After preliminary discussion, the following was had in Chambers, with all counsel present.)

* * * * * * *

Mr. Hammer: The only part of that defense, it is a good defense but they shouldn't be permitted to plead irrelevant and immaterial matters which would cloud the issues. The only part of their defense that is proper is that defendant has elected to come within the Act; (2) that the plaintiff is [fol. 3] an employee of the defendant even though he was employed by the independent contractor and, therefore, if he is an employee within the meaning of the Act, his exclusive remedy is proceeding under the Workmen's Compensation Act. Anything else is immaterial: whether he

brought a proceeding or didn't against his immediate employer, whether he got paid or didn't get paid makes no difference. They are entitled to a complete bar in this action if they prove those three elements, and anything else—for instance, they say that the defendant——

The Court: As I started out to say in the very beginning, what you are doing now, you are moving that they not be allowed to read that defense before the jury because it is a legal defense, purely a question of law and must be decided on legal grounds? Is that what you are moving for?

Mr. Hammer: That's the first motion. Secondly, in the event they are allowed to read it, they should read only that part that is material. They should be confined to the part that alleges, (1) they elected to come under the Act; (2) that the plaintiff is an employee of the defendant, within the meaning of the Act; and if he is an employee of the defendant within the Act, he is barred from bringing this action whether he's recovered compensation or not from any other source.

* * * * * * *

[fol. 5] The Court: Have you got evidence to that effect?

Mr. Walker: Yes, sir, we have the Industrial Commission file. We have the Secretary of the Industrial Commission. We would have the papers that he signed, one being the agreement for compensation, that he executed with the Bouligny insurance carrier, and that is an agreement to [fol. 6] take compensation. Now, all of that is on file with the South Carolina Industrial Commission and we have subpoenaed the Secretary here with the records. We say that—in our Answer we allege that—he was an employee of Bouligny. Now, we must prove, as I see it, and we would have the right to cross-examine him about it, that he took his compensation from Bouligny.

The Court: Looks to me like what Mr. Walker says is correct. In other words, his defense is—and even according to you it looks like he is correct—his defense is that your client elected to go under Workmen's Compensation. That is his defense. If that is his defense, he's got a right to prove it.

Mr. Hammer: Election is not a defense, your Honor.

The Court: He not only elected but received compensation under it.

Mr. Hammer: That is still not a defense. The only defense is if he was an employee of the defendant within the Act.

The Court: He would have a chance to prove that.

Mr. Hammer: Whether he elected to receive compensation from the independent contractor or not, this is a suit against the third party and a third party has no right——

The Court: Let me see if I follow you: You say it makes no difference whether he elected to come under it or not? [fol. 7] Right?

Mr. Hammer: Right.

The Court: Your next point is it makes no difference whether he received compensation?

Mr. Hammer: Correct.

The Court: What does make a difference?

Mr. Hammer: The only thing that makes a difference is if he is an employee within the meaning of the Act, employee of the trade, business or profession of the defendant, if he is——

The Court: He can prove that, can't he?

Mr. Hammer: And that's as far as he's got to go to sustain his defense and if he doesn't sustain his defense——

The Court: Let me see if I follow you, because I don't know anything about this Workmen's Compensation law and don't want to learn except for this case. I don't know anything about it and I am not at my age trying to learn something about it. What you want to do is to strike everything out of his Answer except he was an employee of this concern, whatever it was. I don't know the name of it.

* * * * * * *

The Court: State what you are willing to leave in there. [fol. 8] Mr. Hammer: That they be permitted to set up as a complete defense to this action only that the defendant (1) elected to come within the operation of the Workmen's Compensation Act; (2)——

The Court: I thought you said it wasn't necessary for them to prove it.

Mr. Hammer: The defendant, not the employee.

The Court: The defendant.

Mr. Hammer: (2) That the employee, although he is an employee of the independent contractor Bouligny, was engaged in the performance of work which is part of the trade, business and occupation of the defendant power company. And if he proves those two elements, everything else is immaterial. And if he doesn't prove those two elements, the introduction of any collateral matter would be prejudicial to the plaintiff insofar as indicating he's received benefits from another source and under the law they are not entitled to prove such benefits in mitigation of damages.

The Court: You are willing, then, as I understant, to admit—not to be published before the jury, but for the purpose of any motion made upon the law in the case—you are willing to admit he did receive compensation in the amount he did receive?

Mr. Hammer: Yes, sir.

The Court: On the record, but not in the presence of [fol. 9] the jury. * * *

* * * * * * *

[fol. 11] Mr. Hammer: I will admit that the defendant elected to come under the Act.

Mr. Walker: He admits we are operating under the Act.

Mr. Williams: As I understand, it is admitted this, then: that both Blue Ridge and Bouligny elected to and came under Workmen's Compensation. That is admitted on the record.

The Court: Right.

Mr. Williams: The only other question left would be whether or not this was part and parcel of the business of Blue Ridge. In other words, was—the only question that [fol. 12] would be left is: in the meaning of the Workmen's Compensation Act, was the plaintiff the employee of Blue Ridge Electric? That would be the only question left.

Mr. Hammer: That's correct.

* * * * * * *

[fol. 28] The Court: I am going to let you prove anything you want to prove outside the presence of the jury on this Workmen's Compensation Act. As far as the trial of this case before the jury is concerned, as I said before, it's dwindled into a very narrow issue, as I see it. I may be

wrong. The Circuit Court of Appeals may say I am wrong. But I think as far as the Workmen's Compensation proposition is concerned, it's purely a question of law; * * *

* * * * * * * *

[fol. 120] LEON SANDERS, first being duly sworn, testified as follows:

Direct examination.

By Mr. Edens:

Q. What is your name?
A. Leon Sanders.
Q. And you live where?
A. Seneca, South Carolina.
[fol. 121] Q. Did you work on this job with Mr. Wilson who just testified?
A. I did.
Q. What work did you do? What was your classification?
A. A groundman.
Q. Did your daddy work on that same one?
A. He did.
Q. Is your daddy still alive?
A. No, sir, he died.
Q. Do you recall the construction on the Friday preceding the following Tuesday when Mr. Byrd was injured?
A. I do.
Q. Where were you working that day?
A. Well, I was about the first one got finished that evening. Just before the linemen got done.
Q. Where did you end up?
A. Substation.
Q. You were at the substation?
A. Yes, sir.
Q. Will you tell me who else was at the substation when they finished up that day—when you finished up?
A. Me and my father and Mr. Moss and Mr. Phillips.
Q. Was Mr. Moss there after the line was finished, completed running into that substation?
A. He was.
[fol. 122] Q. Was Mr. Moss in a position to see that the line into the substation had been completed?

A. Yes, sir, if he had been looking, he could.

Q. Was he in a position where he could see it? Was he up there with the others?

A. Yes, sir.

Q. Did he receive any instructions from Mr. Phillips while you were there, or any advice from Mr. Phillips concerning the work?

A. Yes, he did after he finished up.

Q. What happened?

A. Mr. Phillips told Mr. Moss he was finished with the line plumb into the substation and he would go check with the engineer and see everything was okay.

* * * * * * *

[fol. 123] Cross examination.

By Mr. Walker:

* * * * * * *

Q. In order for you to work in that area the way you worked that day, the lines had to be de-energized? Isn't that correct?

* * * * * * *

The Witness: I didn't know anything about the electricity business. I didn't do that kind of work. I was just a groundman.

* * * * * * *

[fol. 124] Q. You say if Mr. Moss had looked, he could have seen this jumper running across the double dead-end pole?

A. Yes, sir, we was standing together looking up at it.

* * * * * * *

[fol. 150] Leon Sanders, recalled, testified as follows:

Direct examination.

By Mr. Edens:

Q. Mr. Sanders, on yesterday you stated that when you finished up work that Mr. Phillips and Mr. Moss and you and one or two others were at the sub-station?

A. Yes, sir.

Q. And you referred to instructions which Mr. Phillips [fol. 151] or information or what instructions which Mr. Phillips gave to Mr. Moss. There is some question about—in my mind—as to just what you said with reference to what Mr. Phillips told Mr. Moss. What did you say with reference to the instruction which Mr. Phillips gave to Mr. Moss? Did you say that Mr. Phillips told Mr. Moss he would or should check with the engineer?

* * * * * * *

[fol. 152] The Witness: He should.
The Court: He should?
The Witness: Yes, sir.

By Mr. Edens:

Q. That who should?
A. That Mr. Moss should.
Q. Mr. Moss should check with the engineer?
A. Yes, sir.

* * * * * * *

[fol. 155] The Court: Under the Rules of Civil Procedure.

(Mr. Edens published the following portions of the Deposition of Ira Moss, taken before Jacqueline P. Peace, Notary Public for South Carolina, on the 6th day of April, 1955.)

* * * * * * *

[fol. 155a] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, ANDERSON DIVISION

Civil Action No. 1523

JAMES EARL BYRD, Plaintiff,

v.

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., Defendant.

DEPOSITION OF IRA MOSS taken April 6, 1955

* * * * * * *

MR. IRA MOSS, being duly sworn, testified as follows:

Examination.

By Mr. Hammer:

Q. You are Ira Moss?
A. Ira Moss, Yes, Sir.
Q. Where do you reside, Mr. Moss?
A. Well, Walhalla, Route 1, Walhalla.
Q. How long have you resided there?
A. Around fourteen years.
Q. By whom are you now employed?
[fol. 155b] A. Blue Ridge Electric Cooperative.
Q. How long have you been employed by them?
A. Since June, 1944, I believe.
Q. In what capacity have you worked for them, Mr. Moss?
A. Well, lineman and sort of assistant foreman sometimes.
Q. And what do you do as a lineman? What do your duties consist of?
A. Just general line work, whatever is required.
Q. Do you check the lines?
A. Well, I mostly work on lines, just for building and adding new services and just general maintenance.
Q. You maintain the lines?
A. Right.

* * * * * * *

[fol. 155c] Q. Who was doing the construction of the new lines?
A. Bouligny Construction Company.
Q. Did you see what lines were being constructed?
A. Well, I worked with the conversion, yes, sir.
Q. And you knew of all the lines that were tied into the conversion?
A. I knew, Yes, Sir. I knew most all about what was being built at that time, the conversion, etc.
Q. And when work was done on the conversion, who would de-energize the lines?

A. I would.

* * * * * * *

[fol. 155d] Q. And before you put the energy back into the lines, I assume you were careful enough to make an inspection to see if everything was all right?

A. Mr. George Phillips was foreman. I de-energized and energized at his request. I worked directly with him at that time.

Q. Mr. George Phillips?

A. Mr. Phillips, Sr.

Q. He was your foreman?

A. He was foreman for Bouligny Construction Company.

* * * * * * *

[fol. 155e] Q. And how do you know what was done, according to what was supposed to be done?

A. We gave a contract to do line work, they go and they have a meeting with the engineers and the people that's to do the work. They have maps and they plan the job. They know what is to be done and have men that is qualified to carry on that work.

* * * * * * *

[fol. 155f] Q. Did he tell you what work he did each day?

A. Not necessarily, no, Sir.

Q. How would you know what work he was doing each day?

A. It didn't make too much difference what he did as far as I was concerned. My main job was to de-energize a line while he was working.

Q. I understand. But how would you know what work he had done each day?

A. I didn't, as far as that was concerned. It was no concern of mine. He had plans, those people worked directly with the engineers in charge of construction and he had plans. As far as knowing what he did, I didn't. I knew the section he was working at and what it would take to de-energize that section. That's all I did, de-energize the [fol. 155g] line and make it safe for him. I grounded it out. After I put the ground on it, I put protective grounds on that in case anything should happen.

* * * * * * *

[fol. 155i] Q. Had that sub-station been energized before Byrd was hurt?

A. It wasn't supposed to be. I had nothing to do with that. There was two types of jobs going on at that time, [fol. 155j] two new sub-stations being built which was entirely new stuff and that conversion was doing, that was what I was interested in. I had nothing to do at all with the sub-station at Walhalla or Pickens. That was entirely new stuff. I didn't work around it at all. In fact, I rarely went there because Mr. Haas was in charge of that. Nothing was energized there. I had no business there at all.

* * * * * * *

[fol. 155k] Q. Wasn't part of that line cut off and the new route made?

A. They had built a new part to this line. That is, they had built it back to the sub-station. They hadn't been turned over to us, that was entirely Southern Engineering and Bouligny contracting at that time. We had nothing to do with that. The only thing we were interested in was to keep our customers that was served off this particular line, to see they had sufficient current during all this operation and they had to always arrange that they could keep the power on the larger percentage of the time and that wasn't for us to figure at all. That was Southern Engineers and Bouligny Construction Company.

* * * * * * *

Q. Let me ask you a question. You turned off the current from the same place where you turned it on, is that right? After you were informed of the accident that Byrd had?

A. Yes, Sir. I took it off and took down the jumpers that they had put on their, Bouligny's men.

Q. Where were those jumpers?

[fol. 155l] A. The jumpers should have been—not have been, there, which was a grave mistake of Mr. Bouligny's men that did it. It was not twenty-four steps of where Mr. Byrd got hurt.

Q. Twenty-four steps of where Mr. Byrd got hurt?

A. That's right. Any new line—any time, contractors are not supposed to put up any jumper on anything connecting any line until that line is complete and they are

through with that line and it is turned over to the cooperative and then we are to put up all jumpers to make any line hot on any new construction, which was the oversight of Mr. Bouligny's men that connected the jumpers, which shouldn't have been. That was a grave mistake of theirs.

* * * * * * *

[fol. 155m] Q. When you put the energy on, didn't you know what lines were hotted up and what were not hotted up?

A. The ones I energized was to serve Ebenezer Community. They wasn't supposed to go into any sub-station. They wasn't supposed to be hot for thirty days yet. Even before that Southern Engineers—on any new construction—any engineering company, if you are familiar with those contracts, we are not allowed to bother any new construction until after Southern Engineers has checked it and approved it and signed a release to us on it.

* * * * * * *

[fol. 155n] Q. New stuff is not supposed to be dangerous?

A. No, Sir. Unless they make it so themselves. We didn't

A. No, Sir. Unless they make it so themselves. We don't have anything to do with it until it is released to us.

Q. This was a new line though that was running into the sub-station, was it not?

A. That's right. We didn't have a thing in the world to do with it and we wasn't supposed to be around it and wasn't around it.

* * * * * * *

[fol. 160] Mr. Edens: This is the deposition of Mr. A. J. Hurt, taken on the 11th of March, 1955.

(Mr. Edens publishes the deposition as follows.)

* * * * * * *

[fol. 160a] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA; ANDERSON DIVISION

Civil Action No. 1523

JAMES EARL BYRD, Plaintiff,

v.

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., Defendant.

DEPOSITION OF A. J. HURT, TAKEN MARCH 11, 1955

* * * * * * *

MR. A. J. HURT, being duly sworn, testified as follows:

Examination.

By Mr. Hammer:

Q. Your full name is what, Sir?
A. Alvin Judson Hurt.
Q. Where do you live, Sir?
A. I live in Easley.
Q. And what is your occupation?
A. I am Manager of the Blue Ridge Electric Co-op in Pickens.
Q. And how long have you been Manager?
A. Since the beginning. 1939, I believe, when we organized.
[fol. 160b] Q. You were Manager of the Blue Ridge Electrical Co-op on February 17, 1953 when Mr. Byrd was injured?
A. Yes, sir.
Q. And where are you stationed, Mr. Hurt?
A. I live in Easley. We have an office in Pickens and one in Westminister, Sir.
Q. Have you ever had occasion to visit the sub-station at Walhalla?
A. Not while the work was going on, no, Sir. Not until after it was turned over to us.

Q. Have you ever seen the lines before they were connected up? The new lines I have reference to.

A. I will answer it this way, Sir. My work takes me by there in going to Westminster and, naturally, I would look at the lines, all our lines, going from Pickens to Westminster. Yes, Sir.

Q. Did you make any observation as to the date the new line from the sub-station connecting to the old line was put up?

A. No, sir. Not until we accepted the lines, Sir.

Q. And when did you accept the line?

A. We accepted the lines on March 19, 1953.

Q. That's approximately one month and two days after the injury?

A. According to what I have heard here, yes, Sir.

Q. Where do the lines running from the place that the new line was connected, extend?

A. Let me make myself clear at the beginning, Mr. Hammer. We contracted this work, sir, and we had Southern Engineering Company in Atlanta, that did our engineering and so it was not my job, Sir, to have anything to do with [fol. 160c] that work. It was under a Resident Engineer, Mr. Shealy, for Southern.

Q. Mr. Shealy was the Resident Engineer?

A. Resident Engineer, yes, Sir.

Q. And it was he and Bouligny that were responsible and did all the work until the lines were officially accepted by the Blue Ridge Electric Co-op?

A. Yes.

* * * * * * *

Q. Did you make an investigation of the injury when it happened?

A. No, Sir.

Q. Do you know who made the investigation?

A. No, Sir.

Q. Was any investigation made?

A. I don't know, Sir. Not for the Blue Ridge Co-op because Mr. Byrd was not our man, Sir.

Q. And you felt that you were only responsible for your men that were hurt?

A. That was all I was responsible for and the station was not ours, Sir.

* * * * * * *

[fol. 160e] Q. And Mr. Shealy works for whom?

A. Mr. Shealy works for the Southern Engineering Company in Atlanta. He is not an employee of the Blue Ridge [fol. 160f] Electric Co-op. You see, they, Southern Engineering Company is an engineering firm, of course, as the name implies, and they are engineers on this work. They are retained, they receive a retainer fee twelve months a year for doing our engineering and, again I say, Mr. Shealy was their engineer.

* * * * * * *

[fol. 160g] Q. Did Mr. Moss work under you?

A. Mr. Moss is one of our linemen and we have our work broken down. Mr. Green, our line foreman, is in Westminster and Mr. Moss works under him, Sir.

Q. Is Mr. Moss still employed by your company?

A. Yes, sir.

* * * * * * *

[fol. 160i] Q. Are all your projects accepted in writing?

A. Yes, sir. We don't consider them ours until after that acceptance.

Q. Is that acceptance on record?

A. Yes, sir.

* * * * * * *

[fol. 160j] Q. After that old line was accepted, was there any other work done on that old line?

A. After a line is accepted by us, a contractor does no more work on it. No, Sir.

* * * * * * *

[fol. 161] (Mr. Edens publishes deposition of Mr. A. J. Hurt, taken on September 2, 1955, before Rosa McGowan, Notary Public for South Carolina.)

* * * * * * *

[fol. 161a] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, ANDERSON DIVISION

Civil Action No. 1523

JAMES EARL BYRD, Plaintiff,

v.

BLUE RIDGE ELECTRIC COOPERATIVE, INC., Defendant.

DEPOSITION OF A. J. HURT taken September 2, 1955

* * * * * * *

Mr. A. J. HURT, being duly sworn, testified as follows:

Examination.

By Mr. Hammer:

* * * * * * *

[fol. 161c] Q. Who approved these plans and specifications?

A. Southern Engineering Company with REA.

* * * * * * *

[fol. 161d] Mr. Hammer: I am going to ask that question again, Mr. Walker, so we will have it clear, and if you instruct the witness not to answer, I propose to ask the Court for an order.

Q. Mr. Hurt, do you know what precautions, if any, the Blue Ridge Electric Cooperative takes with reference to the safety of employees of the contractor working on the project?

Mr. Walker: I object because you are getting right back into the same channel which has been asked approximately 15 times or so. Mr. Hurt has stated time and again that the construction was entirely covered and controlled by Bouligny under its contract with Bouligny, and under Blue Ridge contract with Southern Engineering Company. Consequently, you are persisting in asking Mr. Hurt a ques-

tion involving engineering and related matters which he says he is not familiar with.

* * * * * * *

[fol. 162] COLLOQUY

Mr. Walker: I submit that there counsel is not reading testimony that avails anything by way of discovery. Mr. Hurt will testify and if they propose to ask that question to which I objected at the time, then your Honor will rule upon it properly at the time, but certainly my reply is not part of the discovery.

The Court: The only thing Mr. Walker said would be proper to read would be an objection. If it is an objection, you can read it and I will pass on the objection.

Mr. Walker: The witness did not answer, your Honor.

The Court: He did not answer?

Mr. Walker: No, sir.

The Court: He said he didn't answer. He can state his objection later, if any.

Mr. Edens: Your Honor, if they are going to put him up, maybe we will get it then.

The Court: What?

Mr. Edens: I won't pursue it. If they are going to put him up——

The Court: Counsel said they are going to put him up.

[fol. 163] Mr. Walker: Yes, sir.

The Court: The only thing about it is, under one phase of the case, I think probably it ought to be answered now if it is a proper question.

Mr. Edens: It certainly is a proper one.

The Court: No use for me to state what I have reference to in the presence of the jury, but I think I will pass upon the objection now and let him answer it now, if counsel for the plaintiff wishes to pursue that course. If not, you can pursue any course you see fit.

Mr. Edens: I think it would be proper for us to ask your Honor to excuse the jury and put him up and ask him.

The Court: You object to it now, Mr. Walker?

Mr. Walker: Yes, sir, I object to the question.

The Court: I don't see any objection to the question.

Mr. Walker: My objection was based upon the constant repetition, that that question had been asked a number of times and it was repeated—it would be brought back and asked again in a different form, and it would come back time and time again. If they wish to go ahead and ask the question now, Mr. Hurt is here and if your Honor overrules my objection to the question, Mr. Hurt will answer the question. If your Honor rules the question proper——

* * * * * * *

[fol. 166] The Court: All I am concerned with is whether or not the question is competent. If you want to ask the question now, I will put him on in the presence of the jury and let him answer it.

Mr. Edens: We tried for 15 pages before to try to get him to answer it and never got him to answer it and I will be glad to have him answer.

Mr. Walker: Just so there won't be any question, it was pursued in the second hearing and I——

The Court: Counsel's contention, whether right or wrong, is now that he has not directly answered the question, that he's more or less evaded.

Mr. Walker: I just don't want any reluctance interpreted on the part of the witness. I was the person making the objection.

* * * * * * *

[fol. 167] A. J. Hurt, first being duly sworn, testified as follows:

Direct examination.

By Mr. Edens:

Q. Mr. Hurt, do you know what precautions, if any, the Blue Ridge Electric Cooperative took on the project on which Mr. Byrd was injured with refererence to the safety of employees of the contractor working on the project?

A. Mr. Edens, the contract speaks for itself.

The Court: No, no. Answer that question. You are not answering it. I order you to answer the question.

The Witness: I still don't know.
The Court: You don't know?
The Witness: No, sir.
The Court: Read that question again. Read it, Miss Stenographer.

[fol. 168] (The Reporter refers to notes, during which time the following was had:)

The Court: If you don't answer the question, I might adjudge you in contempt of Court and put you in jail.
The Witness: No, sir, Judge, I wouldn't do that.
The Court: I am just warning you.

(Reporter reads the pending question, Lines 14-17, inclusive, Page 167 of this transcript.)

The Witness: I do not know.
The Court: You don't know any precaution he took? Is that your answer?
The Witness: Yes.
The Court: I think that is a fair answer, "I don't know of any precautions he took."

* * * * * * *

[fol. 168a] INTERROGATORIES PROPOUNDED BY APPELLEE AND ANSWERS THERETO GIVEN BY APPELLANT

No. 1

Q. On February 17, 1953, was the defendant engaged in the business of supplying and transmitting electric power use in the Ebenezer Community at or near Walhalla, South Carolina?

A. On February 17, 1953, the defendant was engaged in the business of supplying and transmitting electric power and the Ebenezer Community was one of the communities served.

No. 2

Q. On February 17, 1955, was the defendant the owner of power lines transmitting electricity from its sub-station at Westminster to, and for use in, the Ebenezer Community at or near Walhalla, South Carolina?

[fol. 168b] A. On February 17, 1953, the defendant was the owner of power lines transmitting electricity from its substation at Westminster to, and for use in the Ebenezer Community, but owned only such lines, as were in existence on January 8, 1951.

No. 3

Q. On February 17, 1955, was the defendant in control of power lines transmitting electricity from its substation at Westminster to, and for use in, the Ebenezer Community at or near Walhalla, South Carolina?

A. On February 17, 1953, the defendant was in control of such power lines transmitting electricity from its substation at Westminster to, and for use in the Ebenezer Community as were owned by the defendant and in existence on January 8, 1951.

No. 4

Q. On February 17, 1955, was the defendant in possession of power lines transmitting electricity from its substation at Westminister to, and for use in, the Ebenezer Community at or near Walhalla, South Carolina?

A. On February 17, 1953, the defendant was in possession of such power lines transmitting electricity from its substation at Westminister to, and for use in the Ebenezer Community as were owned by the defendant and in existence on January 8, 1951.

No. 5

Q. Did the defendant engage R. H. Bouligny & Co., Inc., under a written contract, to construct for the defendant a substation on its premises at or near Walhalla, South Carolina?

A. Yes.

* * * * * * *

[fol. 168c] No. 10

Q. Upon completion and acceptance of the substation at Walhalla, South Carolina, were the power lines, constructed and installed by R. H. Bouligny & Co., Inc., con-

necting from the substation at Walhalla, South Carolina to the power lines serving the Ebenezer Community, to be used for the purpose of transmitting electric power from the substation at Walhalla, South Carolina to the [fol. 168d] lines serving the Ebenezer Community?

A. Yes. After completion and acceptance of both the substation at Walhalla and lines leading therefrom.

* * * * * * *

[fol. 180] COLLOQUY

The Court: You can make a motion for directed verdict and failing in that, make a motion for involuntary dismissal. * * *

* * * * * * *

[fol. 182] Mr. Walker: The next ground relates to the Workmen's Compensation law and the position of the defendant with respect to Workmen's compensation. The record shows that the plaintiff has admitted all of the ingredients of the Workmen's Compensation defense except one: those admissions being that the Blue Ridge operated under the Act; that Bouligny operated under the Act; that the plaintiff accepted compensation benefits and received the full benefits provided by law. It is further [fol. 183] admitted that the defendant Blue Ridge did occupy the status of owner under the Act, provided it is shown that the work being performed when this injury occurred constituted a part of the trade, business and occupation of the company.

The Court: As this is stated in this case of Raymond Doane against DuPont. Are you familiar with that?

Mr. Walker: I don't know that I have that.

The Court: January, 1954. "Whether claimant was injured while engaged in an operation which entered directly into and became a part of the business of the person for whom the work was being done." Does that state it properly?

Mr. Walker: Would you state that again?

The Court: The only question left open, as I understand it, after the admissions by the plaintiff, is this: I am quoting from the words of this case. "Whether the claimant

was injured while engaged in an operation which entered directly into and became a part of the business of the person for whom the work was being done." Is that it?

Mr. Walker: Yes, in that respect the testimony shows that the defendant was having this work done by R. H. Bouligny, the employer of the plaintiff. There is no conclusion that could be drawn from the plaintiff's testimony——

The Court: No what?

Mr. Walker: No conclusion could be drawn from the plaintiff's testimony except this: that the plaintiff intended [fol. 184] to show that Blue Ridge was participating and cooperating in this construction. Now, the plaintiff's testimony was intended to show that Ira Moss, the man who died from drowning, was requested to notify the engineer with regard to an inspection. The testimony would show—intended to show—that the defendant Blue Ridge had some responsibility in connection with that substation with regard to the posting of signs, with regard to keeping the gate locked. Everything that the plaintiff would show in that respect points to a duty of performance on the part of Blue Ridge in connection with this particular work being done. Now, we say that if that be the case, then it necessarily follows, particularly with the Statute of which the Court would take notice under which Blue Ridge was incorporated and under which Blue Ridge (a statutory creature) necessarily operated, when that is considered in connection with what the plaintiff intended to show as to what the defendant Blue Ridge did, through its employees at this particular place and this particular substation, then we say that it necessarily follows that the work being done constituted a part of Blue Ridge's trade and business. The two things necessarily go together, your Honor. If Ira Moss was there, if he was doing this work towards cutting off energy or cutting it on, or if he was directed according to the plaintiff to see that the line was inspected, if Blue Ridge had any responsibility in connection with the construction of that substation, in connection with maintain-[fol. 185] ing safety precautions for the construction of that sub-station, then we say it must follow that it constituted a part of our trade and our business. That is what they attempted to show and we say if it is concluded that

they did show what they attempted to show, then it must follow that under the law we are to be considered in the category of the employer under the South Carolina Workmen's Compensation Act. * * *

* * * * * * *

[fol. 188] The Court: What I am going to do—this is a very, very technical point. What I mean is, I can't come to any conclusion about it one way or the other. What I am going to do as to your last ground, I am going to take that under advisement and think about it and see if I can't work it out. Your argument has helped me some but—here's what I have got to decide, that the evidence—what I have got to decide is whether or not the claimant was injured while engaged in an operation which entered directly into and became a part of the business of the person—and that means the Blue Ridge Company, doesn't [fol. 189] it?

Mr. Williams: Yes.

The Court: For whom the work was being done. Must enter directly and become a part of the business. I can't come to any conclusion about it. I will have to take it under advisement.

* * * * * * *

[fol. 194] The Court: What you are saying is this: what they claim was negligence on the part of Blue Ridge, even if it was negligence on the part of Blue Ridge that caused this man's injuries, but when they prove that negligence they also prove that was an operation which entered di- [fol. 195] rectly into and became a part of the business of the person which they were working for?

Mr. Walker: Exactly, your Honor. I wish I could state it as well. That's exactly it and it goes on and that is certainly our position on that particular point.

The Court: Gentlemen, I am going to take the whole thing under advisement. It is a mighty close question. Mighty pretty question. That is a beautiful argument you are making on that thing, Mr. Walker. I congratulate you. You really applied it very efficiently, whether I agree with you or not. I will have to think it over. In the meantime, I will take it under advisement.

* * * * * * *

[fol. 206] Mr. Walker: Your Honor please, it is my understanding that the contract between Blue Ridge and R. H. Bouligny is admitted and we would like to have the contract marked in evidence at this time and there are several sections that I would like to publish.

The Court: Very well.

(Contract received in evidence as Defendant's Exhibit C.)

* * * * * * *

[fol. 206b] EXHIBIT "C"

NOTICE AND INSTRUCTIONS TO BIDDERS

1. Sealed proposals for the construction, including the supply of necessary labor, materials, and equipment except meters, of a rural electric distribution project to be financed pursuant to a Loan Contract between Blue Ridge Electric Cooperative, Inc., Pickens, South Carolina (hereinafter called the "Owner") and the United States of America by the Administrator of the Rural Electrification Administration, dated ....., 19...., and to be known as Project South Carolina—38P—Oconee, which is to be part of the System known as South Carolina—38—Oconee, will be received by the Owner on or before ..... o'clock A.M., Eastern Standard Time, June 19th. 1952, at its office, No. Pickens, South Carolina at which time and place the proposals will be publicly opened and read.

2. The Project will be approximately 24.19 miles in length and 87.69 miles of conversion and located in Oconee, Greenville, Pickens and Anderson Counties, in the State of South Carolina, all as more fully described in the Plans, Specifications, and Construction Drawings therefor hereinafter referred to.

* * * * * * *

[fol. 206c] CONTRACTOR'S PROPOSAL

(Proposal shall be submitted in ink or typewritten)

To: Blue Ridge Electric Cooperative, Inc., Pickens, South Carolina (hereinafter called the "Owner").

1. The undersigned (hereinafter called the "Bidder") hereby proposes to construct the rural electric distribution project South Carolina—38P—Oconee in strict accordance with the Plans, Specifications and Construction Drawings therefor, attached hereto and made a part hereof, and to furnish all materials, machinery, tools, equipment, labor, transportation and other means necessary therefor, for the prices hereinafter stated:

[fol. 206d] CONDITIONS OF ENERGIZATION OF EXISTING LINES UNDER WHICH WORK UNDER SECTIONS H, I, AND N OF CONTRACTOR'S PROPOSAL SHALL BE PERFORMED

LINE SECTION (To be Designated by Point to Point Description on Detail Map)	Hours and Days of Week When Lines Will be De-energized to Permit Line Changes
1. Walhalla Substation Area	9:30 A. M. to 11:30 A. M.
2. Pickens Substation Area	1:30 P. M. to 4:30 P. M.
3. Liberty Substation Area	
4. Cross-Roads Substation Area	Monday thru Saturday
5. Tigerville Substation Area	

The Bidder will so plan and perform its work on the above lines that it will be possible for the Owner to safely re-energize all lines involved at the expiration of the time limits set up in the above schedule to resume service to all consumers being served prior to deenergization. Prior to commencement of work each day on lines to be deenergized, the Bidder will notify the Owner in writing thereof, designating the lines to be deenergized and upon receipt of such notice, the Owner will deenergize such lines. Upon completion of

work each day on such deenergized lines, the Bidder will notify the Owner thereof in writing or in such other manner as the circumstances permit designating the lines to be reenergized and stating that such lines may be safely reenergized and upon receipt of such notice, the Owner will reenergize such lines.

[fol. 206e] DESCRIPTION OF SYSTEM LINE CHANGES AND ASSEMBLY UNITS INVOLVED THEREIN

I. General

The general heading of Line Changes applies to the changing of existing lines or portions thereof from their existing phasing, wire size, and type, to new phasing, wire size, and type, and the removal of existing lines or portions thereof and replacing with new lines in close proximity thereto. In general line changes involve three types of assembly units as follows:

Section H—Conversion assembly units.

Section I—Removal assembly units.

Section N—New construction assembly units on existing lines or on replacing lines.

All bids are to be made on a unit basis so that the Engineer may specify any combination of assembly units that he may deem necessary. Work performed under these sections shall be performed under the special conditions of energization as set forth in the Contractor's proposal.

* * * * * * *

[fol. 206f] CONSTRUCTION AGREEMENT

* * * * * * *

[fol. 206g] ARTICLE II—CONSTRUCTION

* * * * * * *

SEC. 2.—*Supervision and Inspection.*

(*a*) The Contractor shall cause the construction work on the Project to receive constant supervision by a competent superintendent (hereinafter called the "Superintendent")

who shall be present at all times during working hours where construction is being carried on. The Contractor shall also employ, in connection with the construction of the Project, capable, experienced and reliable foremen and such skilled workmen as may be required for the various classes of work to be performed. Directions and instructions given to the Superintendent by the Engineer shall be binding upon the Contractor.

* * * * * * *

[fol. 206h] (*c*) The manner of construction of the Project, and all materials and equipment used therein, shall be subject to the inspection, tests and approval of the Engineer and the Administrator, and the Contractor shall furnish all information required by the Engineer or by the Administrator concerning the nature or source of any materials incorporated or to be incorporated in the Project. The Owner and the Administrator shall have the right to inspect all pay rolls, invoices of materials, and other data and records of the Contractor and of any subcontractor, relevant to the construction of the Project. The Contractor shall provide all reasonable facilities necessary for such inspection and tests and shall maintain an office at the site of the Project, with telephone service where obtainable, and at least one office employee to whom directions and instructions of the Engineer may be delivered. Delivery of such directions or instructions in writing to the employee of the Contractor at such office shall constitute delivery to the Contractor. The Contractor shall have an authorized agent accompany the inspector when final inspection is made and, if requested by the Owner, when any other inspection is made.

(*d*) In the event that the Owner or the Administrator, shall determine that the construction contains or may contain numerous defects, it shall be the duty of the Contractor and the Contractor's surety or sureties to have an inspection made by an engineer approved by the Owner and the Administrator for the purpose of determining the exact nature, extent and location of such defects.

(*e*) The Engineer shall have the authority to suspend the work wholly or in part for such period or periods as the

Engineer may deem necessary due to unsuitable weather or such other conditions as are considered unfavorable for the satisfactory prosecution of the work or because of the failure of the Contractor to comply with any of the provisions of the Contract:

* * * * * * *

[fol. 206i] Article IV—Particular Undertakings of the Contractor

Section 1.—*Protection to Persons and Property.*

The Contractor shall at all times take all reasonable precautions for the safety of employees on the work and of the public, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building and construction codes. All machinery and equipment and other physical hazards shall be guarded in accordance with the "Manual of Accident Prevention in Construction" of the Associated General Contractors of America unless such instructions are incompatible with Federal, State, or Municipal laws or regulations.

The following provisions shall not limit the generality of the above requirements:

(*a*) The Contractor shall at no time and under no circumstances cause or permit any employee of the Contractor to perform any work upon energized lines, or upon poles carrying energized lines, unless otherwise specified in the Notice and Instructions to Bidders.

* * * * * * *

(f) The Project, from the commencement of work to completion, or to such earlier date or dates when the Owner may take possession and control in whole or in part as hereinafter provided shall be under the charge and control of the Contractor and during such period of control by the Contractor all risks in connection with the construction of the Project and the materials to be used therein shall be borne by the Contractor. The Contractor shall make good and fully repair all injuries and damages to the Project or any portion thereof under the control of the Contractor by reason of any act of God or other casualty or cause whether

or not the same shall have occurred by reason of the Contractor's negligence. The Contractor shall hold the Owner harmless from any and all claims for injuries to persons or for damage to property happening by reason of any negligence on the part of the Contractor or any of the Contractor's agents or employees during the control by the Contractor of the Project or any part thereof.

* * * * * * *

[fol. 206j] SEC. 2.—*Delivery of Possession and Control to Owner.*

Upon written request of the Owner approved in writing by the Administrator the Contractor shall deliver to the Owner full possession and control of any section of the Project provided the Contractor shall have been paid at least ninety percent (90%) of the cost of construction of such section. Upon such delivery of the possession and control of any section of the Project to the Owner the risk and obligations of the Contractor as set forth in Article IV, Section 1 (*f*) hereof with respect to such section of the Project so delivered to the Owner shall be terminated: *Provided, However,* That nothing herein contained shall relieve the Contractor of any liability with respect to defective workmanship or materials as contained in Article II, Section 3 hereof.

SEC. 3.—*Energizing the Project.*

* * * * * * *

(*b*) The Owner shall have the right to energize permanently any section or sections of the Project delivered to its possession and control pursuant to the provisions of Section 2 of this Article.

* * * * * * *

[fol. 206k] Article VI—MISCELLANEOUS

SECTION 1.—*Definitions.*

* * * * * * *

(*b*) The term "Engineer" shall mean the engineer employed by the Owner, with the approval of the Administra-

tor, to supervise the construction of the Project, and said Engineer's duly authorized assistants and representatives.

* * * * * * *

[fol. 206l] SEC. 6.—*Franchises and Rights-of-Way.*

The Contractor shall be under no obligation to obtain or assist in obtaining: Any franchises, authorizations, permits or approvals required to be obtained by the Owner from Federal, State, County, Municipal or other authorities; any rights-of-way over private lands; or any agreements between the Owner and third parties with respect to the joint use of poles, crossings, or any other matter incident to the construction and operation of the Project.

* * * * * * *

[fol. 206m] MISCELLANEOUS.

Sufficient safe, cool drinking water and an adequate first-aid kit must be provided on every work truck. Adequate safety equipment and construction tools for the workmen shall be provided by the Contractor.

* * * * * * *

[fol. 215] A. J. HURT, first being duly sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Hurt, it is in the record, I believe, that you are the manager of Blue Ridge Rural Electric Co-operative, Inc.?

A. Yes, sir.

Q. Is that right, sir?

A. Yes, sir.

Q. And you have been the manager for since about 1939?

A. Yes, sir.

Q. I believe you and I started to work for them at the [fol. 216] same time?

A. Yes, sir.

Q. Mr. Hurt, in what sort of business is the Blue Ridge Rural Electric Co-operative engaged?

A. We are engaged, sir, in serving the rural people in Pickens, Oconee, Anderson and Greenville Counties—parts of those counties, sir—with electricity and we also maintain our own lines; we have our own construction crews and build distribution lines, transmission lines and substations, sir.

Q. So that is the business of the defendant?

A. Yes, sir.

Q. How many miles of line does the Cooperative have at this time in its system?

A. Approximately two thousand miles.

Q. How many members does it have?

A. Has—the tenth of last month—10,816.

Q. How many miles of line did it have when it first started operation back there in 1939 or 1940?

A. I don't recall the exact number, sir, but I think it was around three hundred and something, sir.

Q. Did the Co-op construct that line itself?

A. That was built by the State Rural Electrification Authority.

Q. And transferred to this Co-op?

A. Yes.

Q. And about how many members did the Cooperative have at that time?

[fol. 217] A. I would say between twelve and fifteen hundred, sir.

Q. Does the Cooperative do any construction work with its own employees, Mr. Hurt?

A. Yes, sir, we do, sir. We maintain our own crew of eight linemen and eight groundmen and the metermen, sir, making an outside crew of approximately 16.

Q. What kind of construction is done by the Cooperative's own employees?

A. We do all types of construction. We run third wires for electric ranges and water heaters and we build short extensions. We have built some extensions up to eight miles, but since the end of World War II, we have so many hundreds of people wanting electric service in our rural areas, we have contracted quite a bit of our work, sir.

Q. Do the employees of the Cooperative regularly and continuously carry on construction work?

A. Yes, sir, we are doing construction work——

Mr. Edens: We submit this witness is being led a little too much on that question.

Mr. Williams: All right, sir.

The Court: Go ahead.

The Witness: We do quite a bit of construction work ourselves all the time, yes, sir.

By Mr. Williams:

Q. Has the Cooperative been carrying on that sort of [fol. 218] construction work with its employees from the beginning of its work or not?

A. As far as I know, yes, sir.

The Court: The way to ask that, Senator, is "How long have you been carrying it on?" The way you put it is leading.

By Mr. Williams:

Q. How long has it been carrying on this construction?

A. I would say since the lines were transferred over from the State Rural Electrification Authority and that would be about—I think that was completed in 1940 or 1941, sir.

Q. Does the Cooperative construct substations with its own employees?

A. Yes, sir, we have constructed substations.

Q. Have any been constructed by its own employees similar to the one near Walhalla that has been under discussion in this case?

A. Yes, sir, we have built substations of that nature.

Q. Do you recall how many substations the Cooperative has built with its own employees?

A. Yes, sir, we built three.

Q. Is the work which is done by the Cooperative's own employees done under engineering supervision?

A. Yes, sir, we have capable men that do that work and also we get assistance from the leading electrical manufac- [fol. 219] turers and Southern Engineering has been our engineers from the very beginning of our project. We call on them for help, sir.

A. We are engaged, sir, in serving the rural people in Pickens, Oconee, Anderson and Greenville Counties—parts of those counties, sir—with electricity and we also maintain our own lines; we have our own construction crews and build distribution lines, transmission lines and substations, sir.

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Q. Is the work which is done by the Cooperative's own employees done under engineering supervision?

A. Yes, sir, we have capable men that do that work and also we get assistance from the leading electrical manufac- [fol. 219] turers and Southern Engineering has been our engineers from the very beginning of our project. We call on them for help, sir.

Q. Is the work, construction work, done by the employees inspected by an engineer?

A. Yes, sir.

Q. Does the work that is done by the employees have to be up to any special standard?

A. Yes, sir.

Q. What is that standard?

A. It has to meet the requirements of—set forth by the Rural Electrification Administration and those specifications are very rigid, sir.

Q. I believe you have already stated the name of the engineering firm that attended to this work?

A. Yes, sir. Excuse me, your Honor. May I put a cough-drop in my mouth?

The Court: Yes.

Q. What was the name of that firm?

A. Will you repeat that?

Q. Did you answer that question?

A. I asked you to repeat it, sir.

Q. State—do it quickly—the name of the engineering firm that has been used in connection with this work.

A. Southern Engineering Company.

Q. And I believe you have already stated that you have [fol. 220] ten men? Is that right? On construction?

A. Yes, sir, we have approximately sixteen outside men working all the time, sir.

Q. Now, Mr. Hurt, about what part of the time do your outside men spend on maintenance?

A. They spend about a third of their time on maintenance.

Q. And what is the other two-thirds of their time spent on?

A. Two-thirds of the time is on construction, which includes construction of distribution lines and running third wires.

Q. Mr. Hurt, at my request, state whether or not you have examined this contract that has been introduced in evidence, particularly as it relates to types and classes of construction work?

A. Which contract are you referring to?

Q. The one that has been introduced in evidence between Bouligny and Blue Ridge.

A. Yes, sir, I have looked at that contract.

Q. When have you examined it?

A. I have looked at it in the last few weeks, sir.

Q. Had you read the contract or examined it prior to the taking of the deposition?

A. No, sir, I had not, sir.

Q. Based on the examination you made of that contract, I want to ask you this question, please, sir. Is there any sort of construction work called for in that contract which [fol. 221] the employees of the Blue Ridge Electric do not do?

A. Will you repeat that?

Q. In other words, stated differently, do the Blue Ridge Electric Cooperative employees in connection with construction do all of the types and classes of work that was being done under this Bouligny contract?

A. Yes, sir.

Q. Mr. Hurt, while this Bouligny contract was being performed, did the employees of Blue Ridge Electric carry on construction work not covered by the contract? In other words, were your men doing work, construction work, on lines and so on not covered by this contract?

A. Yes, sir, we have been doing practically continuous work, construction work, since the end of World War II.

Q. Mr. Hurt, if the employees of the Cooperative could and did do all the types of work called for in that contract, why was the contract let? Why didn't the employees do it?

A. I would say to expedite matters. We have had several contracts, five or six, let since the end of World War II. Most of our member consumers have been added since the end of the Second World War. Because prior to that time we had just two or three thousand consumers.

Q. When the Cooperative has work done by contractors, do they always provide in the contract that the contractor shall furnish both labor and materials in the past?

[fol. 222] A. Not necessarily, no, sir. Sometimes it is a matter of furnishing labor and material and again they just furnish the labor and the Cooperative furnishes material.

Q. Under the Bouligny contract, and with special reference to the work that was done under that contract, did you superintend any of the work done under the Bouligny contract?

A. No, sir, I did not.

Q. While that construction was going on, did you go out into the field and inspect any of the construction?

A. No, sir, not at all.

Q. That was called for in that contract?

A. No, sir.

OFFERS IN EVIDENCE

Mr. Walker: We wish to offer this, your Honor, and we can mark it now.

(Engineering Service Contract, dated June 30, 1952, between Blue Ridge Electric Cooperative, Inc., and Southern Engineering Company, received in evidence as Defendant's Exhibit D.)

Q. Is that the engineering contract under which the Bouligny work or in connection with which the Bouligny work was done?

A. Yes, sir, that is what it so states, yes.

Q. Mr. Hurt, do you recall when the substation near [fol. 223] Walhalla was completed and turned over to the Cooperative for use?

A. No, sir, I don't recall the exact date but I believe it was in March or February, 1952.

Q. Was it turned over— you have——

Mr. Walker: This letter has been marked for identification by plaintiff's attorneys, your Honor.

Mr. Williams: We hand you that letter, Mr. Hurt.

Mr. Walker: We introduce this, your Honor.

(Letter dated March 19, 1953, Mr. A. J. Hurt, Manager, from R. H. Bouligny, Inc., by E. J. Dale, received in evidence as Defendant's Exhibit E.)

The Court: Proceed.

Mr. Walker: May I look at it?

The Witness: Yes, sir, I recall this letter.

By Mr. Williams:

Q. I believe that letter is dated March 19, 1953?
A. Yes, sir.
Q. And that advised you that this substation had been completed and was ready for energization?
A. Yes, sir.

Mr. Walker: I would like to publish the letter, your Honor.
[fol. 224] The Court: All right, sir.

(Mr. Walker publishes Defendant's Exhibit E.)

By Mr. Williams:

Q. When was the substation energized?
A. On March 19, 1953, sir.
Q. Mr. Hurt, do you of your own knowledge know anything with respect to the facts surrounding the plaintiff's accident at the substation?
A. No, sir, I do not, sir.

* * * * * * *

[fol. 225] Cross examination.

By Mr. Edens:

Q. Mr. Hurt, your deposition was taken in Pickens in your home office?
A. The second one was, yes, sir.

Mr. Walker: The first one was taken at Anderson, Mr. Edens.

By Mr. Edens:

Q. You were asked in Pickens or wherever you were asked, were you asked this question: "Do you have a copy of the contract entered into between Bouligny and Blue Ridge Electrical Co-op?"

[fol. 226] Mr. Walker: May I ask what page he is reading from?
Mr. Edens: Page Six. (To the witness) You said, "Yes, sir." "Where is that contract?" You said, "We have it at

Pickens, Sir." So, this must have been in Anderson. "We have it at Pickens, Sir." "And that is available?" "Yes, sir. I would say it was available." You were asked: "Are you familiar with the terms of the contract?" And your answer was "No, sir."

A. Yes, sir.

Q. And the question was, "Who handles that, sir?" And your answer—did you give this answer? "You couldn't have gotten anybody that knows less about this thing, Mr. Hammer, than A. J. Hurt because my duties are altogether administrative, Sir."

A. That's correct.

Q. That is a correct answer and that is still correct?

A. Yes.

Q. You couldn't find anybody who would know less about this thing than you, about building substations and new lines? That's what the contract with Bouligny related to?

A. At that time. You are reading from the deposition that I took and I will agree that I said that.

Q. Is this still correct or do you want to say that that is not so today? You have learned a lot since that, haven't you?

A. That's exactly right, sir.

[fol. 227] Q. You have been going to school or what have you been doing to get so much sharper?

A. I have looked at the contract, sir.

Q. And I believe you said you all had been building substations ever since you all started this Co-op?

A. That's correct, sir.

Q. I believe you all had built three?

A. Yes, sir.

Q. Who were the engineers on those three?

A. Southern Engineering Company, sir.

Q. The same ones that were on the—that built the substation where Mr. Byrd got his arms burnt off?

A. They were engineers for it, yes, sir.

Q. Same engineers?

A. Yes.

Q. Same set-up?

A. I wouldn't say the same set-up. They checked our work, sir.

Q. They performed the same function in that instance that they performed in the instance of the substation where Mr. Byrd got his arms burned off?

A. If I may explain——

The Court: Answer the question and then you can explain your answer.

(At the direction of the Court, the Reporter read the pending question, Lines 18-20, inclusive, above.)

[fol. 228] The Witness: Yes, sir.

The Court: Now, you can explain that answer, if you wish.

By Mr. Edens:

Q. Do you wish to explain that?

A. That's sufficient, sir.

Q. Who is your electrical engineer?

A. We have one man that has——

The Court: Who is he?

The Witness: Mr. J. M. Porter, sir.

By Mr. Edens:

Q. Mr. J. M. Porter?

A. Yes, sir.

Q. How long have you had him?

A. He has been with us from the very beginning.

Q. Where does he stay?

A. He stays in Pickens. He is our line superintendent, sir.

Q. And he is an electrical engineer?

A. He is not a graduate electrical engineer, no, sir.

Q. I see. He's just titled, kind of like "colonel"?

A. No, he went—if I may explain—he went to Carolina a couple of years and took electrical engineering, sir, and through the years he's gained quite a bit of experience, sir.

Q. Have you checked to see whether or not he has a legal right to call himself an engineer?

A. We have him titled as line superintendent.

The Court: That wasn't his question.

[fol. 229] The Witness: No, sir.

By Mr. Edens:

Q. You know he is not entitled to call himself engineer, don't you?

A. No, sir, I didn't know that, sir.

Q. How many substations do you have?

A. We have six, sir.

* * * * * * *

Q. How long prior to the construction of this substation that Mr. Byrd got his arms burnt off on had it been since a substation had been constructed in behalf of the Blue Ridge or by them?

A. Approximately three years.

Q. Where was that one?

A. That's at Liberty.

Q. At Liberty?

A. Yes, sir, South Carolina.

Q. Who built that?

A. We did, sir.

Q. You built that?

A. Yes, sir.

Q. Three years before?

A. Yes, sir.

[fol. 230] Q. And who was the engineer?

A. Southern, sir.

Q. Southern Construction Company?

A. Southern Engineering Company, sir.

Q. Do you have the contract? Do you have the contract under which you built that?

A. That was under our retainer set-up with them, sir.

Q. With Southern Construction Company?

A. Yes, sir.

Q. You don't have anybody in your organization that are capable of handling the technical aspects of building a substation? You heard the question, didn't you?

A. That's right. No, sir.

Q. Then you are in error in your testimony on direct when you said that the regular employees of the Blue Ridge R.E.A. are qualified to do all types and classes of work that Bouligny Construction Company does?

A. Yes, sir.

Q. You say you have got about nine linemen now?
A. Yes, sir.
Q. Have you added any since Mr. Byrd got hurt?
A. No, sir.
Q. You have got about 2000 miles of line?
A. Approximately that, yes, sir.
Q. Do they all have automobiles to travel in or travel by [fol. 231] plane or what?
A. We have 19 pieces of equipment, yes, sir.
Q. And you say you've got over 10,000 customers?
A. 10,816 as of last month, sir.
Q. That means houses you tapped into, not people in the houses?
A. That's right.
Q. You did testify that you had let five or six contracts since the War to build substations?
A. That's correct.
Q. You meant to say five or six?
A. Yes, sir.
Q. And you got six in all. Then, you built three. That would make nine, wouldn't it?
A. Mr. Edens, you said contracts, sir. And while ago you asked how many substations.
Q. Well, I meant contracts for substations. I am not trying to mislead you.
A. I beg your pardon. I thought you mean general construction as well as substations, sir.
Q. I believe you stated that you had energized a substation in March, the 19th, of 1953; that was also energized on February 17, 1953, when this boy got his arms burnt off, wasn't it?
A. No, sir. The station was turned over to us on March 19, sir.
Q. But it was energized previously when he got burnt?
A. Not to my knowledge, sir.
[fol. 232] Q. Oh, I see. You don't know about that?
A. No, sir, I do not, sir.
Q. You don't know anything about construction of substations or new lines except what you have learned since they took your deposition, do you?
A. Will you ask that again?

Q. You don't know anything about the construction of substations or the construction of new lines except what you have learned since they took your deposition?

A. That's right, sir.

Q. Before they took your deposition, you wouldn't have known the necessary qualifications for a person to have charge of building a substation, would you?

A. Probably so, yes, sir.

Q. You are not certain?

A. Yes, sir.

* * * * * * *

[fol. 330] A. J. HURT, recalled, testified as follows:

Cross examination.

By Mr. Edens:

Q. Did I understand you—I mean, I understood yesterday that you testified you had six substations in the Blue Ridge setup?

A. I think I said five or six, sir, yes, sir.

Q. Is that correct?

A. Yes.

Q. Is it five or six?

A. I would say six, sir.

Q. Will you tell me where they are?

A. They are at Liberty——

Q. Liberty?

A. Yes, sir. Pickens, Tigerville, Walhalla, Westminster and Seneca. That's the six, sir.

Q. Is your Oakway station what you mean by Tigerville? The one at Oakway?

A. I beg your pardon. I would like to change that, sir. If I may, your Honor. We do have a station at Oakway, sir, and that would be seven and Duke Power Company has what we call eliminated our Tigerville substation. That's why it wasn't clear in my mind.

Q. It's still six?

A. It's still six but I would eliminate the Tigerville substation.

[fol. 331] Q. You testified yesterday when you were talking about the facilities that Blue Ridge had, that you had built three substations?

A. Yes, sir.

Q. Do you still stick to that testimony? Do you want to change that now or don't you?

A. We built the original three substations, yes, sir.

Q. Which ones? What you are saying, the original——

A. Yes, sir.

Q. Which were they?

A. They were Liberty, sir, South Carolina; Tigerville; and Westminster, sir.

Q. Didn't you testify yesterday that you built the substation at Liberty three years ago?

A. No, sir.

Q. Am I in error in saying that you testified you built the substation at Liberty three years ago?

Mr. Walker: Your Honor please, I object to the attorney asking the witness whether or not the attorney is in error. He's asked this question; the witness has answered it.

Mr. Edens: I am trying to get the truth.

The Court: He is trying to refresh his memory.

The Witness: If I may say, I said we built a substation at Liberty about three years ago, sir. That's what I said, sir.

[fol. 332] Q. You intended to give the jury and the Court the impression that Blue Ridge themselves built that with their own facilities? Wasn't that the impression you sought to give?

A. The original?

Q. No, the one you built three years ago?

A. No, sir.

Q. You didn't build the one at Liberty, did you?

A. The station there——

Q. Three years ago, you didn't build that substation yourself?

A. No, sir, I didn't intend to give that impression, sir.

Q. Blue Ridge didn't build the original substation; you got it from the State, didn't you?

A. Not to my knowledge, sir.

Q. Did they not have a substation when they took over the line from the State?

A. To my knowledge, the first time I saw it, approximately 15 years ago, there was one transformer there, sir, which I don't consider a substation, sir.

Q. You don't consider a transformer a substation?

A. No, sir.

Q. The substation at Pickens was built by Bouligny?

A. The one there now, sir, yes, sir.

Q. And the substation at Walhalla was built by Bouligny?

A. Yes, sir.

Q. And the substation at Liberty was built by who?

[fol. 333] A. The one there now, sir, I don't know who built it off-hand, sir.

Q. You don't know who built your substation at Liberty?

A. Not right now, I do not, sir.

Q. Would it refresh your recollection to name Sumter Builders? Do you recall now that they built that substation?

A. Since you mentioned it. They did some work for us, sir.

Q. I didn't ask you that. I said, didn't they build your substation at Liberty? You don't know whether they did or not?

A. I would say they did, yes, sir.

* * * * * * *

Q. You didn't build any of the stations that you are operating now?

[fol. 334] A. No, sir, we—no, sir.

* * * * * * *

[fol. 344] EDWARD VINCENT MCMAHON, first being duly sworn, testified as follows:

Direct examination.

By Mr. Walker:

Q. Mr. McMahon, where do you live, sir?

A. Atlanta, Georgia.

Q. And by whom are you employed?

A. Southern Engineering Company.

Q. Would you state your qualifications as an engineer, sir?

A. I have a Bachelor of Science in Electrical Engineering from the Georgia School of Technology or Georgia Institute of Technology. I am a full member of the American Institute of Electrical Engineers. I was chairman of the Georgia Section of Electrical Engineers during the previous year and at the present time I am a member of the executive committee or a director of the Georgia Section of the American Institute of Electrical Engineers. I am a licensed engineer.

[fol. 345] Q. Have you had experience with rural electric co-op work?

A. For the past 17 years, with the exception of four years service with the Signal Corps, I have been engaged in the active practice of electrical engineering with respect to rural electrification.

Q. Do you have knowledge of and work with the business of the defendant, Blue Ridge Rural Electric Co-op?

A. Yes.

Q. For how long have you been doing work with them?

A. For the past nine years.

Q. In what capacity have you worked with Blue Ridge Co-op?

A. As a design and consulting engineer.

Q. And how long have you been doing that type of work with the Blue Ridge Co-op?

A. Ever since getting out of the Army, I have either done it myself or supervised the design of all work that has been done by the Cooperative.

Q. Did the Southern Engineering Company, for whom you state you work, have the engineering contract on this project on which Mr. Byrd was injured?

A. Yes, sir.

Q. Did you yourself work in connection with this project?

A. Yes, sir.

Q. Were you the consulting engineer under that contract on this project?

[fol. 346] A. Yes, sir.

Q. And that relates or does that relate to this contract that Blue Ridge had with Bouligny?

A. Yes, sir, it came first.

Q. Which came first?

A. The engineering service contract.

Q. Now, are you acquainted with any construction work performed by Blue Ridge Co-op through its own employees?

A. Yes, sir.

Q. Is that work similar in type to the work performed by Bouligny under this contract?

A. Yes, sir.

Mr. Edens: If the Court please, the witness should state what the work is. We submit that that is the way the question should be.

The Court: I think so.

Q. Then, Mr. McMahon, with reference to the type of construction work that was done under this Bouligny contract, would you just state what type of construction work was done under that contract?

A. The type of work done by Bouligny under the construction contract consisted of the construction of what we call new construction, the conversion of existing lines, and the moving of existing lines in accordance with the approved design; also, the erection of a small amount of [fol. 347] transmission line and the erection of two substations and one what we call breaker station.

Q. Was the Pickens substation constructed under this Bouligny contract?

A. Yes, sir.

Q. I ask you who prepared the specifications for the construction of the double circuit distribution system that was constructed under the Bouligny contract, leading out of the Pickens substation?

A. Mr. Major Porter, Construction Superintendent of the Blue Ridge Electric Cooperative.

Q. Does the sort of work that was done by Major Porter, about which I just asked you, require special technical knowledge and skill?

A. Yes, sir.

Q. With regard to the types of work that you have mentioned, I will ask you if the types of work mentioned under that contract, performed by Bouligny, if you are acquainted with any construction work of that type performed by Blue Ridge Co-op through its employees?

A. Yes, sir.

Q. Can you state some of the types of work included under that contract that is performed by Blue Ridge Co-op through its employees?

A. Well, the Cooperative is constantly engaged in construction work. They are constantly building new lines to [fol. 348] new consumer members, of various lengths, some short, some long, depending on the circumstances and the location of the consumers with regard to the existing system. They also in many instances find it necessary to "heavy up" as we call it, or increase the load capacity of their existing system to handle power loads.

The Court: Are you talking about the defendant, now?

The Witness: Yes, sir, Blue Ridge Electric Co-op.

The Court: You said the Cooperatives.

The Witness: Pardon me. The construction crews of the Blue Ridge Electric Cooperative are constantly doing construction work. These Blue Ridge Electric Cooperative crews are faced with the problem daily of building new construction to new consumer members, at various distances from the existing line. The Blue Ridge Electric Cooperative also finds it necessary at many times to "heavy up" as we call it, their existing system in order to be able to carry additional power loads that they might develop on their system. The Cooperative also has to maintain their existing transmission system. By that, I mean replacing insulators and stringing in new wire, due to lightening damage or other operating hazards. The Cooperative also finds it necessary to work in their substations resetting breakers, reworking damaged equipment and/or supervis- [fol. 349] ing it, and resetting existing regulators. Is that what you want?

By Mr. Walker:

Q. All right, sir, with regard to the material under this Bouligny contract, for the Walhalla substation, do you know who supplied the material under that Bouligny contract?

A. Yes, sir.

Q. Who did, sir?

A. The Blue Ridge Electric Cooperative purchased and furnished to the——

Mr. Edens: They have a written contract about that. It should speak for what they did instead of this man going back and giving a resume of who bought what. They have got a contract setting out all that.

The Court: The contract is what governs.

Mr. Walker: Yes, sir, and what the witness is saying is supported by the contract.

The Court: Point out in the contract what it is. The contract speaks for itself. It's in evidence, isn't it?

Mr. Walker: Yes, sir. (To the witness) I will ask you this, Mr. McMahon: does the contract provide for purchase of materials?

A. What do you mean by that?

Q. Does the contract provide who shall purchase the material?

A. The contract specifies, or under the terms of the contract, the contractor furnishes all material with the except-
[fol. 350] tions noted, and in the case of this contract, it specifically states that the substation shall be furnished by the owner or the Blue Ridge Electric Cooperative. The two substations and the breaker station.

Q. Do you know under what provision of the contract this line in question that ran from the insulators on the sub on down to the Ebernezer community, do you know under what provision of the contract that line was constructed?

A. Yes, sir.

Q. What section?

A. What we call the "I" section and the "N" section of the contract.

Cross examination.

By Mr. Edens:

Q. The Blue Ridge had nothing to do with the substation and the new construction leading into it until the final acceptance, inspection and acceptance approximately a month after Mr. Byrd got his arms burnt off, didn't it? Under the provision of your contract?

A. Under the provision of the contract governing——

The Court: Is that true or not?

The Witness: Partially true. How do I get out of that?

Mr. Edens: I don't know. You work out the best way [fol. 351] you can.

The Court: Tell what part is true and what is not.

The Witness: The substation wasn't put under the control of the Cooperative until such time as the contractor turned it over to the Cooperative. In the erection of line under the "N" and "I" section of—let's leave "I" section out, because that covers removal of line only. Under the "N" section, the construction periods are controlled by the Cooperative through the terms of the contract and they are, as you say, in the contract and are available if you want them. By that, it is meant that any line constructed in this manner——

Q. I didn't ask you—what does it say?

A. In the contract, sir?

Q. I am not asking you to interpret the contract.

A. No, sir, I wasn't trying to. Under the working conditions set up for the contractor, he controlled the line built under the "N" section and turned it back to the Cooperative in accordance with the outage hours set by the contract.

Q. Until that substation was turned over to the Co-op and accepted by them, the Blue Ridge Co-op wasn't supposed to have anything to do with that substation?

A. That's right, sir.

Q. If a fellow for the Co-op knowingly ran electricity into that substation prior to that time, he would be a tres- [fol. 352] passer, would he not?

A. If the Cooperative man wilfully ran——

Mr. Walker: If your Honor please, counsel has used an expression "trespasser," which has a legal meaning under the law and I object to the question.

The Court: Reframe the question.

Mr. Edens: He would be running electricity in on property where he had no business doing it?

The Witness: If the Co-op——

The Court: Is that true or not?

The Witness: Could he restate the question? With the interruption, I have lost the track.

(At the direction of the Court, the Reporter read the pending questions, Lines 24-25, inclusive, Page 351, and Line 1, above; Lines 7-8, inclusive, above.)

The Witness: Yes, sir.

* * * * * * *

DEFENDANT RESTS

Mr. Walker: The defendant rests, your Honor.

The Court: Anything in reply?

Mr. Edens: We have a motion, your Honor.

The Court: Gentlemen, go to your jury room. (Jury retires.)

[fol. 353] PLAINTIFF'S MOTION TO STRIKE

Mr. Hammer: If the Court please, at this time we move to strike the affirmative defense interposed by the defendant with respect to those allegations that the plaintiff is excluded or precluded from bringing this action, by reason of the fact that he was engaged in work which is part of the trade, business and occupation of the defendant, within the meaning of the Workmen's Compensation Act, for the reason that it has been conclusively demonstrated that the defendant is not engaged in the business of constructing substations; and the business of Bouligny was one for the construction of substations and under the provisions of the Act under which the defendant was incorporated, it was engaged in the business of supplying and distributing electricity.

* * * * * * *

[fol. 354] The Court: In the event I overrule your motion, do you contemplate putting up any testimony in reply? You have that right, of course. On this point, I mean.

Mr. Hammer: We haven't discussed it, but we are making that motion. I frankly don't know at this point of any reply that is necessary. I don't know of any evidence in this case——

[fol. 355] The Court: I am inclined to think so far it is a question of law but I will hear from Mr. Walker on that.

I don't know of any issue of fact to submit to the jury. It seems to me under the testimony here there has been—I don't know of any conflict in the testimony, so far as that's concerned, so far.

Mr. Hammer: I listened carefully to the last witness, and——

The Court: Do you agree with that, Mr. Walker, that that is a question of law?

Mr. Walker: I think it is a question of law because there has been no evidence presented by the plaintiff to dispute the position.

The Court: The reason I am making that inquiry as to whether you intend to put up any more testimony in the event I overrule your motion, counsel may wish to move for a directed verdict on that ground since it is a question of law. But that is his prerogative after all the evidence is in. Of course, he can't move for a directed verdict as long as you have a right to reply.

Mr. Hammer: We are moving at this time in the nature of a voluntary dismissal.

The Court: You move to dismiss that defense?

Mr. Hammer: Yes, sir, at this stage of the game.

The Court: What do you say, Mr. Walker?

Mr. Walker: Your Honor please, we say that the evidence could not be more clear, that the defendant co-op was in the business that is covered by this contract; that is, the work that was being performed.

The Court: Let me see. You call it "co-op" but the de-[fol. 356] fendant I am talking about the defendant in this case, it seems to me that the business they engage in is selling electricity. They are not in the contracting business. They don't go build substations for Gaffney, Newberry and somebody else, do they?

Mr. Walker: But they are in the business constructing the identical things that were being constructed under this contract.

The Court: If that were true, there wouldn't be any such—in other words, if a main part of his line was broken down or something like that or a substation blew up by lightening and he went and fixed it, you say he's in the contracting business, building plants for people?

Mr. Walker: The defendant is in the business of building lines.

The Court: For itself?

Mr. Walker: Yes, sir. And this project, this thing that Bouligny was doing was for the defendant. The defendant is in the same business of doing for himself what Bouligny was doing for him. It is authorized by statute. It was a necessarily integral part of his business and the testimony shows that the defendant regularly did, performed, engaged in the things that were being constructed under the contract.

The Court: After Mr.—the gentleman—corrected his testimony, how many substations have they built?

Mr. Walker: They have built three, your Honor.

The Court: I understood he changed his testimony, that they had not built three.

Mr. Walker: Yes, sir, they have built three all told. I am certain they have built three. One of those, as I under-[fol. 357] stand has been subsequently replaced, but still they have built three.

The Court: What bothers me about your defense is: what is the business of these people? The business of these people is selling electricity. They are not contractors to build substations.

Mr. Walker: Their business is that which is declared by the statute and they do all things that is so declared by the statute. The special statute——

The Court: If they fix a plumbing fixture in their toilet, would you say they are engaged in the plumbing business?

Mr. Walker: No, sir, and I do not say they are engaged in the private contracting business.

The Court: If they build a bathroom and put plumbing fixtures in it, would you say they are engaged in the plumbing business?

Mr. Walker: No, sir.

The Court: It is necessary for their men to use that bathroom.

Mr. Williams: But that is remote from the business itself.

Mr. Walker: I say here that the defendant is engaged in the things that were being done in this instance for the

defendant under a contract, and the Statute so authorizes them to engage in it and the testimony shows that they regularly engaged in it.

In regard to the authorities, let's take the Duke Power Company case, Marchbanks v. Duke Power. In that case, the independent contractor was painting poles. Now, the Duke Power Company is not engaged in the painting contracting business. Let's go from there and take the Berry v. Greyhound case. There a greyhound bus went into a [fol. 358] garage. The Greyhound Company is not in the garage business insofar as privately, or in the garage contracting business.

The Court: If they were engaged in that business, why did they go to Charlotte and hire this contractor? If they were engaged in that business, they would have done it themselves. Instead of that, they go to Charlotte and get a contractor not only to build this substation but to build others in the past.

Mr. Walker: He testified they did it to expedite the work. Insofar as expediting the business.

The Court: According to your own testimony, you say they only built three and that is half of them. They owned six or seven?

Mr. Walker: They have six, yes, sir.

The Court: According to you they built half of their substations.

Mr. Walker: I believe one of those three has been subsequently replaced, but still they are in the business. Let's go one step further. Let's go back to what the plaintiff has contended insofar as all this case is concerned——

The Court: "Engaged in the business." I have considered your cases; I have considered your argument on them. My idea of engaging in the business is to do something for somebody else. What they are doing—and everything they do about repairing lines and building substations, they do it for themselves. To engage in the business is doing something for somebody else. How can you do business with yourself?

Mr. Walker: I don't think that is the interpretation that——

[fol. 359] The Court: In other words, everything that they do, according to your argument, they engage in that business. If you take the extreme, as I said about the plumbing, if they go built a toilet, they are engaged in the plumbing business. If they build a heating plant for one of their storerooms, they are engaged in the heating business.

Mr. Walker: We are necessarily confined to and referring to the types of construction being performed by Bouligny under the particular contract and we say that the defendant was engaged in the same types of construction that were provided for under that contract.

RULING OF THE COURT

The Court: I can't follow you on that. Anything else you have to say, gentlemen? I will have to grant the motion. I allow you an exception. Bring in the jury.

(12:55 p.m., Jury returns to open Court.)

The Court: Anything in reply?
Mr. Edens: Nothing, your Honor.

* * * * * * *

[fol. 360] DEFENDANT'S MOTION FOR DIRECTED VERDICT, ETC.

The Court: I will allow you to include in that Motion for Directed Verdict your defense which I have stricken, if you desire. In other words, I will allow you to include a motion for directed verdict on the ground that all the testimony shows whatever you want to put in it. In other words, you can add that to it, to reserve your rights. Of course, you could make it on the other. I will allow you to make it if you want to.

Mr. Walker: Yes, sir. I do so desire to make a motion for directed verdict. First, for the record, I wish to include—

The Court: The same grounds you made the motion for involuntary dismissal?

Mr. Walker: All those grounds.

* * * * * * *

[fol. 361] Mr. Walker: Next, we move for a directed verdict upon the grounds that the admissions show, first, that the defendant operated under the Workmen's Compensation law of South Carolina; that the employer of the plaintiff, Bouligny, operated under the Workmen's Compensation law of South Carolina; that the plaintiff accepted from his employer full benefits under the Workmen's Compensation law of South Carolina; and that under the circumstances and as plead in the Answer of the defendant, that the acceptance of the Workmen's compensation by the plaintiff and the full benefit from his employer, since the work being done was directly connected with and constituted a part of the trade, business and occupation of the defendant, that the plaintiff is barred from seeking a recovery from this defendant at common law;

(when ?)

upon the further ground that while the claimant-plaintiff was injured he was engaged in an operation that entered directly into and became a part of the business of the defendant for whom the work was being done; further upon the grounds that when the plaintiff in this case, if he proves or if he has proved any negligence on the part of the defendant, even if it was negligence on the part of [fol. 362] Blue Ridge that caused this man's injuries, when the plaintiff proves that negligence, he necessarily and it must follow that it was—and they have proved, an operation that entered directly into and became a part of the business of the defendant for whom the work was being done.

Now, supplementing that, we have here a contract that called for particular work, as specified in the contract to be done by Bouligny for the defendant. That contract contained different types of work. The evidence in this case conclusively shows and it is undisputed that the——

The Court: You are re-arguing the case now. I just want you to state your grounds. Go ahead. You might consider this as a ground. Undisputed evidence shows what?

Mr. Walker: The undisputed evidence shows that the defendant was engaged in work that is similar in type to the work that was being performed by Bouligny under this contract and which work constituted a part of the trade,

the business and occupation of the defendant; and, supplementing that, that such work which was being performed under this contract, and which I have just stated constituted a part of the trade, business, of the defendant and which the defendant was regularly engaged in, constituted a part of the work which the defendant was authorized to do by special statute, which is included as a part of its powers under the particular statute and which it had the right under the law to engage in and did engage in.

* * * * * * * *

[fol. 364] RULING OF THE COURT

The Court: Very well. Well, I will overrule the motion for a directed verdict. Bring in the jury.

[fol. 365] ARGUMENT AND SUBMISSION—June 7, 1956
(omitted in printing)

[fol. 366] IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7183.

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., Appellant,

v.

JAMES EARL BYRD, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT ANDERSON.

(Argued June 7, 1956. Decided October 1, 1956.)

Before PARKER, Chief Judge, SOPER, Circuit Judge, and MOORE, District Judge.

Ray R. Williams, and Wesley M. Walker (Leatherwood, Walker, Todd & Mann, and Williams & Henry on brief) for Appellant, and Henry Hammer (Henry H. Edens and William E. Chandler, Jr., on brief) for Appellee.

[fol. 367] OPINION—October 1, 1956

SOPER, Circuit Judge:

James Earl Byrd, an electric lineman in the employ of R. H. Bouligny, Inc., a construction company, lost both forearms on February 17, 1953, when he accidentally came in contact with a live wire while working on a construction project of Blue Ridge Rural Electric Cooperative, Inc., which was engaged in the distribution of electricity in rural areas. Byrd filed a claim against his employer under the Workmen's Compensation Act of South Carolina and collected full benefits. He then brought the present suit against the Cooperative claiming that the accident was due, at least in part, to its negligence. Blue Ridge defended on the grounds (1) that the accident was not due to its negligence but to the negligence of Bouligny and the contributory negligence of Byrd, and (2) that even if Blue Ridge were negligent, Byrd's only remedy was afforded by the Compensation Act since the work being done by the contractor was part of the business of the Cooperative. The District Judge rejected the contention that the liability of the Cooperative was confined to the payment of compensation and submitted the negligence questions to the jury, which found a verdict for the plaintiff in the sum of $126,786.80, and the defendant appealed.

Blue Ridge Rural Electric Cooperative was organized as a rural electric cooperative in 1939 under the provisions of the Rural Electric Cooperative Act of South Carolina, Chapter 15 of the South Carolina Code of 1952. Section 12-1021 of this statute authorizes the organization of cooperative nonprofit membership corporations for the pur-

pose of supplying electric energy and extending its use in rural areas; and §12-1025 empowers a cooperative to generate, accumulate and distribute electric energy in rural [fol. 368] areas to its members and to construct, acquire, maintain and operate electric generating plants, buildings and equipment, and any and all kinds of property which may be necessary or convenient to accomplish the purposes for which the corporation is organized.

Acting under this statute, Blue Ridge has engaged in supplying electricity to the rural people of four counties in South Carolina, and in the construction and maintenance of distribution lines, transmission lines and substations. The system was begun by the State Rural Electrification Authority, and comprised 300 miles of line serving 1100 consumers when it was taken over by Blue Ridge in 1939. Since then it has steadily grown until at the time of the trial in the District Court in 1955, it had 2000 miles of line and 10,816 consumers or members.

On June 23, 1952, Blue Ridge let a contract to Bouligny in order to expedite its construction work. It had secured a government loan under a loan agreement approved by the Rural Electrification Administration, acting by the Administrator, and the construction contract was executed in conformity with the provisions of the loan agreement. The contract called for the construction of approximately 24.2 miles of new electric transmission and distribution lines, the reconversion, rephasing and rehabilitation of approximately 87.7 miles of existing lines, and the construction of two appurtenant substations and a breaker station.

The accident in this case happened at one of the substations, known as Walhalla, when the lineman came in contact with a live wire on a line which the contractor was converting from a one-phase or one-wire line to a two-phase or two-wire line. It served the residents of a rural section [fol. 369] known as the Ebenezer Community and was connected at a right angle with a transmission line on a highway at a point about 1250 feet from the Walhalla station.

The conversion required the relocation of a portion of the Ebenezer line where it left the highway, and the running of a new line from the new connecting point to the substation; and meanwhile it was necessary to do the work in

such a manner as to continue the service to the Ebenezer Community as far as it was possible to do so. The construction contract expressly provided in this respect that at the beginning of each day the contractor would notify the owner of the lines to be de-energized and at the end of each day the contractor would notify the owner of the lines to be re-energized, and that in each instance the owner would take the necessary steps to comply with the notice.

On the day of the accident the Walhalla substation was nearly finished but it had not been turned over to the owner and was not scheduled to be energized for another thirty days. The wires running from it to the new connecting point on the Ebenezer line were also in place and one of them received current from another source and was used to service the community. It was brought from the connecting point to a double-end pole located within the fenced area of the substation at a distance of seventy-five feet, and ran thence to the substation itself. It was intended that the current should not run to the substation but should be cut off at the pole by postponing the installation of a connecting device thereon, known as a jumper, until the substation was completed. Unfortunately, through a mistake of a foreman of the contractor, a permanent closed jumper was placed on the pole and a foreman of the owner was notified that it was safe to energize the line, and he did so without inspecting [fol. 370] the line himself. An examination would have shown that the current would run through to the substation. In this situation another foreman of the contractor, who also failed to inspect the line, took the plaintiff lineman to the substation and directed him to make a connection between the line outside and the equipment inside the substation, and the lineman in attempting to do so caught hold of the live wire, believing it to be dead, and was burned.

That the accident was caused primarily by the negligence of employees of the Bouligny company, which is not a party to the instant suit, was abundantly proved and is not in dispute, and on this account Blue Ridge, the defendant company, contends that it should be exonerated. It has been noted above, however, that the construction contract imposed upon Blue Ridge alone, the duty of putting on and cutting off the current during the course of the work when

notified by the contractor; and there was additional evidence offered by a qualified electrical engineer that standard safety procedure in electrical work requires that a person who is responsible for letting power into existing lines to which new lines are connected, must personally inspect the connection before energizing the old lines. Because of this evidence, the issue of negligence on the part of Blue Ridge was submitted to the jury.

Blue Ridge also defended on the ground that recovery was precluded by contributory negligence on the part of the lineman who could have readily seen the permanent bond on the double-end pole only seventy-five feet away, if he had taken the pains to trace the wire from the substation to the pole. The evidence, however, showed not only that he was acting under the orders of his superior when he was hurt, but that he relied on the standard safety regulation that a [fol. 371] new construction built by a contractor must not be energized until it has been inspected, approved and turned over to the owner. Accordingly, the issue of contributory negligence was also submitted to the jury.

We do not question the submission of the issue of contributory negligence to the jury under these circumstances. The sufficiency of the evidence to show negligence on the part of the Cooperative is, however, not free from doubt, but it is not necessary to decide this point in view of the basic defense that the lineman's recovery was limited to the benefits provided by the Workmen's Compensation Act of the State of Carolina, Title 72 of the South Carolina Code of 1952. That statute provides that when an owner undertakes to execute any work which is a part of his trade or business and contracts with any other person for the execution of the whole or any part thereof, the owner shall be liable to pay to any workman employed in the work any compensation under the Act which he would have been liable to pay if the workman had been immediately employed by him. §72-111.

When a contractor agrees to do work for another person which is not a part of the trade or business of the other person and contracts with a subcontractor to do the whole or part of the work, the contractor becomes liable to pay compensation to the workmen of the subcontractor. §72-112.

A like provision for the protection of the workmen of a sub-subcontractor is made in §72-113. When a principal contractor* is liable to pay compensation under these sections, he is entitled to indemnity from any person who would have [fol. 372] been liable to pay compensation independently of the sections. §72-115. A workman may recover compensation from the subcontractor instead of from the principal contractor, but not from both. §72-116. Every employer who accepts the compensation provisions of the Act is required to secure the payment thereof by insurance or otherwise. §§72-401 *et seq.*

The rights and remedies granted by the statute to an employee exclude all other rights and remedies of the employee as against his employer at common law or otherwise, on account of injury, §72-121; and the acceptance of an award under the statute or the procurement and collection of a judgment in an action at law is a bar to proceeding further with the alternate remedy. §72-123.

It was conceded in the Court below that both Blue Ridge, the owner, and Bouligny, the contractor had complied with and were operating under the Compensation Act, and that after the injury the lineman had elected to receive and had accepted full benefits thereunder from Bouligny; and it was also conceded that if the work being done at the time of the injury constituted a part of the business of the cooperative, the present suit must fail. The burden of the appellee's argument rests on the assertion that the construction work done by Blue Ridge itself was limited to everyday operations of hooking up connections for customers and did not include extensive line construction, and in view of the fact that the lineman was hurt while attempting to connect the substation with the new line, it is contended with especial emphasis that the construction of the substation was not part of the business of the Cooperative.

The uncontradicted evidence as to the construction work [fol. 373] done by the employees of Blue Ridge may be summarized as follows: It maintains an outside crew of 8

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* It was said in *Marchbanks* v. *Duke Power Co.*, 190 S.C. 336, 362 that the term "principal subcontractor" is synonymous with owner.

linemen and 8 groundmen, one-third of whose time is spent in maintenance and two-thirds in construction work. It constantly builds new lines to new consumer members and builds extensions, some short and some long, up to eight miles in length; but since the end of World War II so many persons in rural areas have demanded electrical service that it has employed independent contractors to do a large part of the construction work, while continuing to do a considerable part through its own men. All of the construction work, whether done by itself or by outside contractors, is done under the supervision of the Southern Engineering Company, an independent organization conducted by engineers, which is employed by Blue Ridge to make sure that the system complies with the requirements of the Rural Electrification Administration of the United States.

The testimony with respect to the construction of the substations of Blue Ridge, stated most favorably to the appellee, discloses that originally Blue Ridge built three substations with its own facilities, but that all of the substations which were built after the war, including the six it was operating at the time of the accident, were constructed for it by independent contractors, and that at the time of the accident it had no one in its direct employ capable of handling the technical detail of substation construction.

There can be no doubt that all of the work covered by the Bouligny contract was of the class which Blue Ridge was empowered by its charter to perform and that all of it was necessary to enable it to serve the growing needs of the rural communities. Furthermore, the main actor in the whole enterprise was the Cooperative itself. This is seen [fol. 374] the more clearly when we round out, by way of illustration, the whole picture of what was done in the formation and performance of the Bouligny contract. The project was begun when Blue Ridge secured a loan of $334,300.00 from the United States under the Rural Electrification Act of 1934, as amended, to finance the construction work above described, the lines to be located along such routes as the owner with the approval of the Administrator should designate. Blue Ridge then entered into an engineering service contract with the Southern Engineering Company, whereby the Engineer agreed to render the engineer-

ing services necessary for the design and construction of the project. This contract provided for the preparation of plans and specifications by the Engineer, the approval thereof by the owner, the selection of a contractor by competitive bidding, the staking of the project by the Engineer after the procuring of rights of way and easements by the owner, and the supervision by the Engineer of all the details of the construction work as the representative of the owner.

The construction contract with Bouligny conformed to the requirements of the loan agreement. It defined the Engineer as one employed by the owner with the approval of the Administrator to supervise the construction of the project; it authorized the owner, acting through the Engineer with the approval of the Administrator from time to time to make changes in the plans and specifications; it subjected the manner of construction and all materials and equipment used therein, to the inspection and approval of the Engineer, and it required the contractor to maintain an office for the Engineer on the site to facilitate the work of supervision. The contractor agreed to furnish the materials according to the specifications at agreed prices; but the contract showed that the materials of which the substations [fol. 375] were to be constructed were purchased by the Cooperative. The Cooperative assumed the responsibility and agreed to perform the service of de-energizing and re-energizing existing lines during the progress of the work.

From this description there can be no doubt that Blue Ridge was not only in the business of supplying electricity to rural communities, but also in the business of constructing the lines and substations necessary for the distribution of the product, if these words are given their ordinary significance. The appellee says, however, that in the meaning of the compensation statute, construction work is not a part of an owner's business, unless it is of such a character that ordinarily it would be performed by his own employees; and reliance is placed on the evidence that since the war Blue Ridge has sublet the construction of substations to outside contractors, and the line work performed by its own employees has been limited in extent. We do not think this interpretation of the statute is tenable. It will be noticed in the first place that §72-111 makes specific

provision for the performance by a contractor of work which is part of the owner's business and in such case imposes upon the owner the same liability to pay compensation to the contractor's workmen as if they were immediately employed by him. In other words, the statute recognizes the practice of letting out to others the actual performance of one's business and subjects the owner to liability for compensation to injured workers. The manifest purpose is to afford the benefits of compensation to the men who are exposed to the risks of its business, and to place the burden of paying compensation upon the organizer of the enterprise. In consequence, both the owner and the contractors whom he engages to do his work, are subjected to the requirements of the Act, and the workers receive double protection.

[fol. 376] The decisions of the Supreme Court of South Carolina are in accord with these views. Very similar was the case of *Marchbanks* v. *Duke Power Co.*, 190 S.C. 336, where the power company, like Blue Ridge, was in the business of distributing electricity which from time to time required the erection of poles and transmission lines. In carrying out this purpose, it contracted with an outsider to paint 170 metal poles, and one of his workmen was injured while doing the work and sued the power company in an action of tort. It was held that the suit could not be maintained, and that the worker's only remedy was under the Compensation Statute which relieved the power company of common Law Liability. Circuit Judge Oxner, now a Justice of the Supreme Court of the State, whose opinion was set out in full and approved by that Court, described the purpose of the Act in these words, 190 S.C. 343, 344:

> "It was evidently realized by the General Assembly that it would not be fair to relieve the owner of compensation to employees doing work which was a part of his trade or business by permitting such owner to sublet or subcontract some part of said work. Doubtless in many instances such contractors would be financially irresponsible, or the number of employees under him would be so small, as in this case, that such con-

tractors would not be required under the Act to carry compensation insurance. It was therefore, provided under the first paragraph that where such work in which the employee was engaged was part of the owner's trade or business, the owner would be responsible in compensation to all employees doing such work, whether employees of an independent contractor or not."

[fol. 377] A like result was reached in *Bozeman* v. *Pacific Mills*, 193 S.C. 479, where, in the execution of a contract between the owner of the mill and an independent contractor for the painting of a water tank maintained by the mill for fire protection, an employee of the contractor was killed by the unexplained explosion of the tank. A claim against the mill for Workmen's Compensation was resisted on the ground that the workman was not an employee of the mill and that the painting of the tank was not part of its trade or business, because the work was of such dangerous and unusual character that it was never done by the regular employees of the mill but was always let out by contract to an experienced steeplejack. In overruling this contention, the Court said: (p. 483)

"The testimony was to the effect that the mill furnished all the paint, the ladders and any lumber or scaffolding necessary to do the work. As already seen, the contract itself contained a postscript that 'the above work is all subject to inspection and approval by representatives of Pacific Mills.' The tank was an integral part of the mill business. There was also testimony to the effect that the mill desired that the work on the inside of the tank be completed as soon as possible so that its everyday, ordinary service, that of fire protection, could be resumed, it being shown that the mill depended upon this tank for such protection. The very nature of the work done by the mill, that of the manufacture of cotton into cloth, especially required the best of protection against fire. Hence this tank was particularly necessary and essential in the operation and carrying on of the business of the mill. It, therefore, follows

> that the painting of the tank was such a part of the trade, business or occupation of the Pacific Mills as [fol. 378] would constitute Martin a subcontractor, and thus render the mill liable to the beneficiary of Boseman for payment of compensation." *

The appellee seeks to distinguish some of these cases on the ground that in them the injured man was engaged in maintenance work ordinarily performed by the employees of the owner in the operation of the business; but it is manifest that it would defeat the purpose of the Act to make the prime mover of an enterprise liable to pay compensation for injuries suffered in the work of maintenance or repair, whether he is negligent or not, but to exempt him in the more important and more extensive field of new construction. For the same reason, it cannot be held that an owner is not obliged to provide compensation for injuries incurred in the course of construction work performed on his behalf as part of his business, if he customarily lets the work out to independent contractors and does not perform it himself. It will have been noticed that §72-111 of the Act expressly covers an owner who undertakes to perform any work which is part of his business and contracts with any other person for the execution "*of the whole or any part of the work*". Thus, the statute recognizes that work done at the behest of the owner is owner's work; and unless he is held liable to pay compensation for injuries incurred in its progress the underlying purpose of the Act will be frustrated. [fol. 379] The quotation from *Boseman* v. *Pacific Mills* set out above is particularly pertinent in this connection, as are also the decisions in *Parkable* v. *Greenland Oil Co.*, 122

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* For other South Carolina cases in which the owner was found liable for compensation to injured employees of subcontractors, see *Kennerly* v. *Ocmulgee Lumber Co.*, 206 S.C. 481, where the owner of a sawmill let a contract for cutting timber on its own lands under its supervision; *Hopkins* v. *Darlington Veneer Co.*, 208 S.C. 307, where the owner of the plant subcontracted the cutting of timber on its lands; *Smith* v. *Fulmer*, 198 S.C. 91, where a bridge builder sublet the making of fills and the laying of pavement to a subcontractor. See also the decisions of this Court in *Doane* v. *E. I. du Pont de Nemours & Co.*, 209 F.2d 921; *Berry* v. *Atlantic Greyhound Lines*, 114 F.2d 255.

Kan. 720 and *Wisinger* v. *White Oil Co.*, 5 Cir., 24 F.2d 101, cited with approval in *Fairchilds* v. *Duke Power Co.*, *supra*. As was said in that case, 190 S.C. 363:

> "It is the clear purpose of the Act to make the owner, the person interested in having the work done, liable to the employee so injured."

It cannot be denied that Blue Ridge was vitally concerned in the construction of the equipment covered by the Bouligny contract, without which the distribution of its product would have been impossible.

The cases on which the appellee relies are distinguishable on the ground that the work done, although useful to the business, was performed in carrying on a trade or occupation in which the owner of the business was not engaged. Thus, in *Miles* v. *W. Va. Pulp and Paper Co.*, 212 S.C. 424, the owner of a pulpwood plant engaged a contractor to supply him with pulpwood on a commission basis; in *Benbow* v. *Edmunds High School*, 220 S.C. 363, the school authorities employed an electrical contractor to repair a lighting fixture in a high school; in *Horrell* v. *Gulf & Valley Oil Co.*, 15 La. App. 603, a contractor was employed to install a furnace in an oil refinery; in *Packett* v. *Moretown Creamery Co.*, 91 Vt. 97, a contractor was employed to erect a building for a creamery; and in our decision in *Sears Roebuck & Co.*, 172 F. 2d 802, a corporation engaged in the sale of goods contracted with a builder to make certain alterations in a storage warehouse. In *Glidden Rural Elec. Cooperative* v. *Iowa Employment Security Commission*, 236 Iowa 910, the co-[fol. 380] operative was successful in resisting an assessment for unemployment compensation tax on the grounds that it had never had as many as 8 employees and, although it had let contracts for the construction of lines, it had never engaged in the construction work except to make service connections, and hence the Court held that the work done by the contractor was not a part of the *usual* trade or business of the cooperative within the terms of the statute.

We conclude that the work performed by Bouligny under the contract was done in carrying on the trade or business of the Cooperative.

In the District Court the plaintiff conceded that he had no case if the work in which he was engaged when he was injured was part of the trade or business of Blue Ridge. He now contends however, in the alternative, that even if the work was of this character he is not precluded from bringing the present action because Bouligny paid the compensation award and hence the acceptance of the award does not bar his suit under the provisions of §72-123 of the statute. Although the point is now raised for the first time we, nevertheless, consider it since it goes to the heart of the defense and the parties have discussed *in* in the briefs of this appeal.

The contention in our opinion cannot be sustained. It involves the erroneous assumption that although the statute imposes an absolute liability upon the owner of the business to provide compensation, usually effected by carrying insurance for the employees of the independent contractor, the owner loses the offsetting benefit of immunity from suit at law provided by the statute, if the injured workman elects to receive compensation from the contractor. It is generally held under statutes of this kind that both the owner of the [fol. 381] business and his independent contractor, or the principal contractor and his subcontractor where they are the parties concerned, are exempt from suit. A leading case on the subject is *State* v. *Bennett Bldg. Co.*, 154 Md. 159, where the building company was sued in an action at law for the death of an employee of a subcontractor who had undertaken to lay tile floors in a building under construction. Prior to the institution of the suit an award of compensation under the Maryland compensation statute had been paid by the subcontractor. The Maryland statute like that of South Carolina provides that where a principal contractor undertakes under contract the execution of any work in the way of his trade or business and contracts with any other party as subcontractor for the execution of the whole or any part of the work, the principal contractor shall be liable to pay any workmen employed in the execution of the work any compensation under the Act which he would have been liable to pay if the workmen had been immediately employed by him. In considering the effect of

the statute and sustaining the defense that the principal contractor was exempt from suit at law the Court said: (154 Md. 162-163, 165, 167-168)

* * * "The effect of this provision, when brought into operation through the designated state of circumstances, is to impose the absolute liability of an employer upon the principal contractor, when he was not in law the employer of the injured workman. The result then is that where the prescribed conditions exist, the principal contractor becomes by the act the statutory employer of any workman employed in the execution of the work. This absolute statutory liability is not affected by the fact that it is later provided, in section 62, that the workman may elect whether he shall enforce the compensation against the principal contractor [fol. 382] or the subcontractor; or that, whenever an employee proceeds against the principal contractor, the latter shall have the right to join the subcontractor or any intermediate contractor as defendant or codefendant in the case; or that, when the principal contractor is liable to pay compensation pursuant to this section, he shall be entitled to indemnity from any employer who would have been liable to pay compensation to the employee independently of section 62. These provisions leave unimpaired the primary liability imposed by the statute upon the principal contractor. The first gives to the workman the choice of two primary liabilities, as but one is enforceable by him. The second is a matter of procedure, and the third relates to the question of indemnity to the principal contractor by the subcontractor, and neither concerns the liability of the principal contractor to the workman. This primary liability, so imposed by statute upon the principal contractor, is not based upon contract, since the legislation is predicated upon the fact that no contractual relation, as master and servant, exists between the principal contractor and the workman; nor does it flow from a breach of duty, because the liability arises independently of the existence of fault on the part of the principal contractor. This legislation, however, finds its constitutional

support in the consideration that the general welfare is promoted and conserved by requiring the employer and the workman to yield something of their respective rights toward the establishment of a principle and plan of compensation for their mutual protection and advantage."

* * * "It may be said that there were two employers of the dead man. One was his immediate employer, the subcontractor, whose relation was founded in contract: [fol. 383] and the second was his more remote statutory employer, the principal contractor, whose status, with the rights and liabilities growing thereout, was created and determined by law."

* * * "If the construction by the appellant prevail, the dependent may recover compensation of the subcontractor, and also damages at common law against the negligent principal contractor, who is thus taken out of the act, by the dependent's choosing to file her claim against the subcontractor, but who would remain within the act, if she should file her claim for compensation against the principal contractor. In short, the liability of the principal contractor would not be fixed and determined by law, but by the arbitrary exercise of the dependent's will. The result of this contention would be to impose upon the general contractor an onerous and dual liability for compensation or damages, at the election of the employees of a subcontractor, while limiting his liability to his own immediate workmen to compensation alone. This theory would deprive a class of employers within the act of their exemption from all liability save that of compensation, which is an essential part of the general legislative plan. A construction so antagonistic to the fundamental principles underlying the enactment will not be adopted. If an employer is within the act to bear its liabilities, he must remain to be accorded its immunities, in the absence of a clearly expressed legislative intention to the contrary."

The importance of this case for our purposes is seen by the approval given the decision in *Marchbanks* v. *Duke Power Co.* where, as in the pending case, the plaintiff claimed not only that the work being done was not part of [fol. 384] the defendant's business but also that the remedy afforded by the Compensation Act was not exclusive. The Court said: (190 S.C. 351-352)

> "I now come to plaintiff's third and last contention to the effect that his remedy under the Compensation Act is not exclusive. Most of the cases cited as sustaining this contention involve acts which are materially different from that in force in this State in that no direct liability is imposed upon the principal or owner. These acts require such owner or principal to see that the contractor carries compensation insurance for the protection of his employees and only in instances where he fails to do this does liability on his part arise.
>
> "The best reasoned case that I have found on this question is that of *State* v. *Benjamin F. Bennett Bldg. Co.*, 154 Md., 159, 140 A., 52, 53. It involves an act similar in principle to that of this State."

The Court then quoted extensively from the decision of the Maryland Court.

In opposition, the appellee calls attention to the unreported decision of the District Court of the United States for the Eastern District of South Carolina in *Ballard Admx.* v. *Southern Oil Co.* and the decision in *Younginer* v. *J. A. Jones Const. Co.*, 215 S.C. 135. In the *Ballard* case it was held that an action at law would lie against the owner of a building for the death of a workman who was killed while working on the wall of a building for the owner as an employee of an independent contractor, although his estate had recovered compensation from his immediate employer. The decision was based on the theory that §72-111 of the South Carolina Compensation Act imposes liability on an [fol. 385] owner to provide compensation only when the contractor fails to provide coverage. We find it impossible to follow this decision since it seems to us to be in direct conflict with the decision of the Supreme Court of South

Carolina in *Marchbanks* v. *Duke Power Co.* and the cases cited therein.

The decision in *Younginer* v. *J. A. Jones Const. Co.* is relied upon because the Court in its opinion described the liability imposed upon the principal contractor by §72-111 as secondary in nature; and this is taken by the appellee to mean that the principal contractor is only a guarantor and his liability to provide compensation arises only when the subcontractor fails to do so. We do not think that this interpretation of the language can be sustained. A claim for compensation was filed in the cited case by an injured man against his immediate employer under the South Carolina Act for an injury incurred in doing work outside the State: and it was necessary for the claimant to show that the contract of employment was made inside the State. For this purpose he relied on a previous contract of employment in the State between him and a subcontractor of the respondent which had been completely performed. The Court pointed out that the work in South Carolina and the claimant's employment therein had been completed long before the injury outside the State occurred, and also said that the liability of the principal contractor under the terms of the statute is secondary in nature, obviously meaning that the liability of a principal contractor to the employee of a subcontractor rests upon the existence of an employment contract between the subcontractor and his direct employees. The use of the term "secondary" in this context was not inconsistent with the existen of an absolute liability on the part of the principal contractor under the statute. It was pointed out in a note on the subject in 151 A.L.R. 1364, [fol. 386] 1367 that in some jurisdictions the Compensation Acts instead of making the liability of the general employer dependent on the carrying of insurance by the independent contractor, directly impose what amounts to "an absolute although perhaps secondary liability" on the former for injury to employees of the latter. It was obviously in this sense that the phrase under consideration was used in the *Younginer* case. The opinion was written by Mr. Justice Oxner, who cited his former opinion in the *Marchbanks* case, and it is inconceivable that he intended to overrule that decision without expressly saying so.

For other decisions interpreting the varying terms of State Workmen's Compensation Acts see also 58 A.L.R. 894; 166 A.L.R. 813.

The motion of the defendant in the District Court for a directed verdict in its favor should have been granted and, failing this, the subsequent motion of the defendant for judgment in its favor *non obstante veredicto* should have been granted. The judgments of the District Court will therefore be reversed with direction to enter judgment for the defendant.

Reversed.

[fol. 387] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7183

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., Appellant,

v.

JAMES EARL BYRD, Appellee.

Appeal from the United States District Court for the Western District of South Carolina.

JUDGMENT—Filed and Entered October 1, 1956

This Cause came on to be heard on the record from the United States District Court for the Western District of South Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of South Carolina, at Anderson, with direction to set aside the verdict and enter judgment for the defendant (appellant here) in accordance with the opinion of the court filed herein.

October 1, 1956.

Morris A. Soper, United States Circuit Judge.

[fol. 388] [File endorsement omitted]

[fol. 389] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7183

[Title omitted]

Appeal from the District Court of the United States for the Western District of South Carolina at Anderson.

PETITION FOR REHEARING—Filed October 31, 1956

The petitioner prays that this Court grant a rehearing of its decision of October 1, 1956, reversing the judgment of the District Court and remanding the cause, with direction to enter judgment for the defendant, upon the following grounds:

FIRST

The decision of this Court, remanding the cause with direction to enter judgment for the defendant instead of grant a new trial, was obviously based upon its conclusion that, on the issue of defendant's affirmative defense of the [fol. 390] South Carolina Workmen's Compensation Act as a bar to plaintiff's cause of action, "the uncontradicted evidence" shows that the defendant "Blue Ridge has engaged * * * in the construction and maintenance of distribution lines, transmission lines and substations," and upon the fact that no reply evidence in contradiction to that of the defendant on this issue was introduced by plaintiff in the trial of the case. In directing the entry of judgment for the defendant, this Court apparently overlooked that the reason plaintiff did not introduce any testimony in contradiction of that of the defendant on this issue was because of the ruling of the Trial Judge dismissing this affirmative defense and withdrawing such issue from the jury before plaintiff's case in reply. Consequently, the direction to enter judgment for the defendant instead of a direction to grant a new trial denies plaintiff his right to introduce evidence in contradiction to that of the defendant on the issue of defendant's affirmative defense, a right which he would have exercised if the District Judge had ruled adversely to him on his motion to dismiss, and thus deprives him of

his constitutional right to a jury trial on a factual issue. Therefore, this Court must have overlooked that the judgment of this Court is not an appropriate one which is just under the circumstances, as appears from the following contained in the transcript of record:

(Pages 352-353 of Reporter's Transcript.)

"Mr. Walker: The defendant rests, your Honor.
The Court: Anything in reply?
Mr. Edens: We have a motion, your Honor.
The Court: Gentlemen, go to your jury room.

(Jury retires.)

Mr. Hammer: If the Court please, at this time we move to strike the affirmative defense interposed by the defendant with respect to those allegations that the plaintiff is excluded or precluded from bringing this action by reason [fol. 391] of the fact that he was engaged in work which was part of the trade, business or occupation of the defendant within the meaning of the Workmen's Compensation Act, for the reason that it has been conclusively demonstrated that the defendant is not engaged in the business of constructing substations, * * * ."

(Page 355 of Reporter's Transcript.)

"Mr. Hammer: We are moving at this time in the nature of an involuntary dismissal.
The Court: You move to dismiss the defense?
Mr. Hammer: Yes, sir, at this stage of the game."

(Page 359 of Reporter's Transcript.)

"The Court: * * * I will have to grant the motion. I allow you an exception. Bring in the jury.

(12:55 P. M., Jury returns to open Court.)

The Court: Anything in reply?
Mr. Edens: Nothing, your Honor."

SECOND

In reaching the conclusion that the plaintiff while working on the construction of the substation as part of the

construction project was engaged in the trade, business or occupation of the defendant, this Court must have overlooked that there was no evidence that defendant ever engaged in the business of constructing a single project of the magnitude of the project on which plaintiff was injured, which project involved under the construction contract between the defendant and the independent contractor the construction of 24.2 miles of new transmission and distribution lines, the reconversion, rephasing and rehabilitation of approximately 87.7 miles of existing lines, and the construction of two substations and a breaker station at a cost of $334,300.00. The construction work of a project of this magnitude is clearly the business, trade and occupation of an electrical contracting construction firm and not the trade, business and occupation of the defendant whose business is to supply and distribute electric. [fol. 392] power to its customers, within the meaning of the words "trade, business or occupation" used in their ordinary sense, as was so aptly stated by the District Judge on page 356 of the Reporter's Transcript, as follows:

"The Court: What bothers me about your defense is: what is the business of these people? The business of these people is selling electricity. They are not contractors to build substations."

THIRD

The conclusion of this Court that the defendant Blue Ridge constructed with its own facilities and employees three substations and was therefore engaged in the business of constructing substations so as to warrant the application of the South Carolina Workmen's Compensation Act as a bar to plaintiff's cause of action obviously was based upon the testimony of defendant's witness A. J. Hurt, manager of defendant company, who was the only witness that testified concerning the construction of substations.

In reaching this conclusion on the basis of Mr. Hurt's testimony, this Court apparently viewed his testimony out of context, and not as a whole, and overlooked that he finally admitted that the defendant company did not construct with its own facilities any substations, or, at least,

that his testimony contained self-contradictions and was evasive, consequently being susceptible to incredibility, and thus at best making the question of whether defendant constructed with its own facilities substations an issue to be passed upon by a jury, as appears from the evidence of record which shows that Mr. Hurt, although he first testified on direct and cross examination that the defendant company built with its own facilities and employees three substations, the last of which was built three years before trial at Liberty, South Carolina, on being recalled to the [fol. 393] stand the following day for further cross examination, he changed his testimony and admitted that the substation at Liberty built three years before the trial was not constructed by defendant with its own facilities, but by Sumter Builders, an independent contractor engaged in the construction business; and he then finally admitted that none of defendant's substations was built by defendant with its own facilities, as appears from the following evidence of record:

DIRECT EXAMINATION OF A. J. HURT, MANAGER OF DEFENDANT COMPANY

(Page 134 of Appellant's Appendix.)

"Q. Does the Cooperative construct substations with its own employees?

A. Yes, sir, we have constructed sub-stations.

Q. Has any been constructed by its own employees similar to the one near Walhalla that has been under discussion in this case?

A. Yes, sir, we have built sub-stations of that nature.

Q. Do you recall how many sub-stations the Cooperative has built with its own employees?

A. Yes, sir, we built three."

CROSS EXAMINATION OF A. J. HURT

(Pages 51-52 of Appellee's Appendix.)

"Q. How many sub-stations do you have?

A. We have six, sir.

* * * * * * *

Q. How long prior to the construction of this sub-station that Mr. Byrd got his arms burnt off on had it been since a substation had been constructed in behalf of the Blue Ridge or by them?

A. Approximately three years.

Q. Where was that one?

A. That's at Liberty.

Q. At Liberty?

[fol. 394] A. Yes, sir, South Carolina.

Q. Who built that?

A. We did, sir.

Q. Three years before?

A. Yes, sir."

A. J. HURT RECALLED FOR CROSS EXAMINATION
(the following day)

(Pages 72-74 of Appellee's Appendix.)

"Q. Did I understand you—I mean, I understood yesterday that you testified you had six substations in the Blue Ridge set-up?

A. I think I said five or six, sir, yes, sir.

Q. Is that correct?

A. Yes.

Q. Is it five or six?

A. I would say six, sir.

Q. Will you tell me where they are?

A. They are at Liberty.

* * * * * * *

Q. You didn't build the one at Liberty, did you?

A. The station there——

Q. Three years ago, you didn't build that substation yourself?

A. No, sir, I didn't intend to give that impression, sir.

* * * * * * *

Q. And the substation at Liberty was built by whom?

A. The one there now, sir, I don't know who built it offhand, sir.

Q. You don't know who built your substation at Liberty?

A. Not right now, I do not, sir.

Q. Would it refresh your recollection to name Sumter Builders? Do you recall now that they built that substation?

A. Since you mentioned it. They did some work for us, sir.

[fol. 395] Q. I didn't ask you that. I said, didn't they build your substation at Liberty? You don't know whether they did or not?

A. I would say they did, yes, sir.

* * * * * * *

Q. You didn't build any of the stations that you are operating now?

A. No, sir, we—no, sir."

The Court, in concluding that the uncontradicted evidence and only inference to be drawn from Mr. Hurt's testimony was that defendant had constructed with its own facilities and employees three substations, also must have overlooked the evidence of record in the light of the colloquy between the District Judge and counsel for defendant, wherein the Judge during defendant counsel's argument in opposition to the motion to dismiss, stated that he (the Judge) understood that the witness Hurt had changed his testimony given the day previous that defendant built three substations with its own employees, as appears from the following contained in the Reporter's Transcript:

(Page 356 of Reporter's Transcript.)

"The Court: After Mr.—the gentleman—corrected his testimony, how many substations have they built?

Mr. Walker: They have built three, your Honor.

The Court: I understood he changed his testimony, that they had not built three."

And finally, although defendant's counsel contended that Blue Ridge built with its own facilities and employees three of the six substations, the evidence of record conclusively shows that none of the six substations operated by Blue Ridge were built by Blue Ridge with its own facilities or employees, as appears from the following evidence of record:

[fol. 396] (Page 358 of Reporter's Transcript.)

"The Court: If they were engaged in that business, why did they go to Charlotte and hire this contractor? If they were engaged in that business, they would have done it themselves. Instead of that, they go to Charlotte and get a contractor not only to build this substation but to build others in the past.

Mr. Walker: He testified they did it to expedite the work. Insofar as expediting the business.

The Court: According to your own testimony, you say they only built three and that is half of them. They owned six or seven?

Mr. Walker: They have six, yes, sir.

The Court: According to you they built half of their substations.

Mr. Walker: I believe one of those three has been subsequently replaced, but still they are in the business."

* * * * * * *

A. J. Hurt Recalled for Cross Examination

(Page 75 of Appellee's Appendix.)

"Q. You didn't build any of the stations that you are operating now?

A. No, sir, we—no, sir.

Q. Thank you very much."

Moreover, this Court in reaching the conclusion that Byrd's work was part of the business of the defendant, also must have overlooked the evidence of record wherein Mr. Hurt, defendant's manager, disclaimed all responsibility for making an investigation, which would have been defendant's responsibility if Byrd's work were part of defendant's business rendering it liable under the Workmen's Compensation Act, because Mr. Byrd was not "one of our men" and "the station was not ours," as appears from the following evidence of record:

[fol. 397] Witness A. J. Hurt

(Pages 42, 43 of Appellee's Appendix.)

"Q. Was any investigation made?

A. I don't know, sir. Not for the Blue Ridge Coop because Mr. Byrd was not our man, sir.

Q. And you felt that you were only responsible for your men that were hurt?

A. That was all I was responsible for and the station was not ours, sir."

* * * * * * *

"Q. Did you inquire from him as to what he knew about this accident?

A. No, sir, because, as I say, it was no concern of mine because of the fact that it was not one of our men, sir."

* * * * * * *

Notwithstanding the foregoing references to the record, if the testimony of Mr. Hurt on the material issue of whether defendant Blue Ridge built with its own facilities and employees three substations can be construed to mean that defendant had built substations with its own facilities and employees, petitioner assures this Court that, on the basis of his information and belief, he would, if afforded an opportunity, produce testimony and evidence far different from such construction of Mr. Hurt's testimony, and states his *bona fide* belief that he can show, at the least, a genuine dispute over this material fact.

FOURTH

The decision of this Court was also based upon its conclusion that the South Carolina case of *Miles v. West Virginia Pulp and Paper Company*, 212 S. C. 424, 48 S. E. (2d) 26 was not applicable. In reaching this conclusion, it is respectfully submitted that this Court overlooked the principle announced by the Supreme Court of South Carolina that an employee of an independent contractor cannot be deemed to be in the performance of the trade, business [fol. 398] or occupation of the person (owner) engaging the independent contractor where there is no ownership by such person of the subject matter of the work. And it is clear from defendant's answers and its answers to the interrogatories contained on pages 79 through 81 of Appellee's Appendix that the defendant, at the time plaintiff lost both arms by reason of touching the live wire, had not accepted

and did not own, possess nor control the substation and lines on which plaintiff was working. That the defendant did not own the substation at the time of plaintiff's injuries is also apparent from a reading of the decision of this Court in the instant case wherein in discussing the question of liability it is stated that "On the day of the accident the Walhalla substation was nearly finished but it had not been turned over to the owner and was not scheduled to be energized for another thirty days."

The decision of this Court was also based upon its conclusion that *Glidden Rural Electric Cooperative* v. *Iowa Employment Security Commission*, 236 Iowa 910, 20 N. W. (2d) 435, was not applicable. In reaching this conclusion the Court overlooked the principle contained in the cited case that construction work performed by an independent contractor for a Rural Electric Cooperative is not part of the trade, business or occupation of a Rural Electric Cooperative. Obviously the cited case was controlling on the facts herein wherein it appeared that plaintiff was injured as an employee of an independent contractor performing construction work.

The decision of this Court was also based upon its conclusion that the South Carolina cases of *Marchbanks* v. *Duke Power Company*, 190 S. C. 336, and *Boseman* v. *Pacific Mills*, 193 S. C. 439, were controlling on the facts herein. In reaching this conclusion the Court must have overlooked that each of those decisions was confined to facts where the work being performed was on a facility owned [fol. 399] by the "owner," a necessary prerequisite to make an "owner" liable under the Workmen's Compensation Act, *Miles* v. *West Virginia Pulp and Paper Company*, *supra*; and, clearly, the defendant did not own the facility on which plaintiff was working when injured. Evidently, this Court also overlooked that those decisions were confined to factual situations where each of the injured employees was performing maintenance work on a facility owned by the "owner," as distinguished from the work of constructing a new facility not yet "turned over to the owner," which was the work being performed by plaintiff at the time he was injured and lost both of his arms. Moreover, the decision of this Court in the instant case is in direct con-

flict and irreconcilable with the decision of this Court in *Sears, Roebuck and Company* v. *Wallace*, 172 Fed. (2d) 802, wherein the Court held that extensive alteration work performed by an independent contractor for another person (owner) is not part of the trade, business or occupation of such other person (owner).

The decision of this Court was predicated upon its conclusion that the cases of *Miles* v. *West Virginia Pulp and Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 46; *Benbow* v. *Edmunds High School*, 220 S. C. 363, 67 S. E. (2d) 680; *Horrell* v. *Gulf & Valley Oil Co.*, 15 La. App. 603, 103 So. 709; *Packett* v. *Moretown Creamery Co.*, 91 Vt. 97, 99 A. 638, and *Wallace* v. *Sears Roebuck & Co.*, 4 Cir., 172 F. (2d) 802, were not applicable herein under its reasoning that in each of the cited cases the work performed by the employee of the independent contractor was not part of the owner's business because "the work done, although useful to the business, was performed in carrying on a trade or occupation in which the owner of the business was not engaged". In reaching this conclusion this Court must have overlooked that the facts in the cited cases are on "all fours" with those in the instant case, for here the construction [fol. 400] work of large projects, including the construction of the substations, performed herein, although useful to the defendant "owner's" business of supplying and distributing electricity to its customers, is a trade or occupation in which the defendant is not engaged. In the case at bar the only one engaged in the trade or occupation of an electrical construction contractor involving the work performed herein was Bouligny Construction Company—a trade or occupation in which the defendant Blue Ridge was clearly not engaged.

For the reasons set forth above and in the Brief filed by appellee, it is respectfully urged that a rehearing be granted, and that upon such rehearing the judgment of the District Court be affirmed, or in the alternative, the cause be remanded with directions to the District Court to grant a new trial.

Respectfully submitted, Henry H. Edens, Henry Hammer, William E. Chandler, Jr., Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented and filed in good faith and not for delay.

Henry H. Edens, Henry Hammer, William E. Chandler, Jr.

[fol. 401] IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT ANDERSON.

ORDER DENYING REHEARING—Filed and Entered November 15, 1956.

This Court having at its October term, 1956, rendered its decision reversing the judgment of the said District Court appealed from in this cause, and the appellee having on October 31, 1956, filed a petition for a rehearing of the said cause, and the same having been carefully considered,

[fol. 402] It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days. November 15, 1956.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 403] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 404] SUPREME COURT OF THE UNITED STATES
No. 638, October Term, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—February 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.